

(3)

Supreme Court, U. S.

FILED

JUN 14 1996

CLERK

No. 95-1263

In the Supreme Court of the United States

OCTOBER TERM, 1995

CATERPILLAR INC., PETITIONER

v.

JAMES DAVID LEWIS, RESPONDENT

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

JOINT APPENDIX

KENNETH S. GELLER *

Mayer, Brown & Platt

2000 Pennsylvania Ave., N.W.

Washington, D.C. 20006

(202) 463-2000

Counsel for Petitioner

LEONARD J. STAYTON *

P.O. Box 1386

Inez, Kentucky 41224

(606) 298-5117

Counsel for Respondent

** Counsel of Record*

PETITION FOR CERTIORARI FILED FEBRUARY 8, 1996

CERTIORARI GRANTED APRIL 15, 1996

94 pp

TABLE OF CONTENTS

	Page
Relevant Docket Entries From Court Below	1
Complaint	8
Answer Of Defendant, Whayne Supply Company, dated July 6, 1989	12
Answer Of Defendant, Caterpillar Inc., dated July 17, 1989	15
Intervening Complaint Of Liberty Mutual Insurance Group, dated October 6, 1989	19
Order Granting Liberty Mutual Insurance Group Leave To Intervene, dated October 13, 1989	24
Answer Of Defendant, Caterpillar Inc. To Intervening Complaint, dated October 31, 1989	25
Answer Of Defendant, Whayne Supply Company To Intervening Complaint, dated December 19, 1989.....	27
Notice Of Removal, dated June 21, 1990	30
Affidavit Of Leslie W. Morris II	34
Objection To Notice Of Removal, dated June 26, 1990..	36
Memorandum Of Caterpillar Inc. In Opposition To Plaintiff's Objection To Removal, dated July 5, 1990..	39
Motion To Remand, dated July 31, 1990	44
Agreed Order Dismissing Claims Against Whayne Sup- ply Company, dated August 2, 1990	47
Response Of Caterpillar Inc. In Opposition To Plain- tiff's Motion To Remand, dated August 6, 1990	49
Supplemental Response Of Caterpillar Inc. In Opposi- tion To Plaintiff's Motion To Remand, dated August 8, 1990	52
District Court Memorandum Opinion And Order Deny- ing Plaintiff's Motion To Remand, filed September 24, 1990	53
Amended Intervening Complaint And Cross-Claim, dated August 26, 1991	57

TABLE OF CONTENTS—Continued

	Page
District Court Order Granting Plaintiff's Motion To Amend Its Intervening Complaint, filed December 3, 1991	67
Wayne Supply Company's Answer To Liberty Mutual Insurance Group's Amended Intervening Complaint, dated January 20, 1992	68
Answer Of Defendant, Caterpillar Inc., To Amended Intervening Complaint, dated January 27, 1992	72
Answer Of Plaintiff, James David Lewis, To Cross Claim, dated January 31, 1992	77
Agreed Order Dismissing Claims Against Wayne Supply Company, filed June 8, 1993	79
Jury Verdict Form, filed November 22, 1993	81
Judgment, filed November 23, 1993	83
Sixth Circuit Order Vacating Judgment Of The District Court And Remanding Case To The District Court, filed October 11, 1995	84
Order Granting Certiorari, dated April 15, 1996	91

U.S. DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
Ashland Division

Civil Docket for Case #: 90-CV-84

LEWIS

v.

CATERPILLAR, INC., ET AL.

RELEVANT DOCKET ENTRIES *

DATE	PROCEEDINGS
6/21/90	Notice of Removal
6/21/90	Complaint
6/21/90	Answer by defendant Wayne Supply Company
6/21/90	Answer by defendant Caterpillar Inc.
6/21/90	Motion to intervene against Caterpillar Inc. and Wayne Supply Company
6/21/90	Intervenor's Complaint by intervenor plaintiff Liberty Mutual Insurance Group against Caterpillar Inc. and Wayne Supply Company
6/21/90	Answer by defendant Wayne Supply Company to Intervening Complaint
6/21/90	Answer by defendant Caterpillar Inc. to Intervening Complaint

* For the Court's convenience, the docket entries set forth below have been revised and reworded by the parties to more accurately and clearly reflect the actual entries contained in the docket of the U.S. District Court for the Eastern District of Kentucky, Ashland Division.

DATE	PROCEEDINGS
6/21/90	Affidavit of defendant's counsel, Leslie W. Morris II
6/29/90	Objection of plaintiff to Notice of Removal
7/9/90	Memorandum of Caterpillar Inc. in opposition to plaintiff's objection to notice of removal
8/2/90	Motion of plaintiff to remand to Lawrence Circuit Court
8/7/90	Response of defendant Caterpillar Inc. in opposition to plaintiff's motion to remand
8/9/90	Supplemental response of defendant Caterpillar Inc. in opposition to plaintiff's motion to remand
8/26/90*	Order granting motion to intervene against Caterpillar Inc. and Wayne Supply Company
9/24/90	Order upon plaintiffs motion to remand to state court is DENIED; dismissing party Wayne Supply Company with prejudice and plaintiff shall take nothing thereby
1/23/91	Third-Party Complaint: by defendant Caterpillar Inc.; adding Gene Wilson Enterprises
2/19/91	Answer to Third Party Complaint by third-party defendant Gene Wilson Enterprises
7/19/91	Pretrial Memorandum by defendant Caterpillar Inc.
7/19/91	Witness list submitted by defendant Caterpillar Inc.
7/19/91	Exhibit list by defendant Caterpillar Inc.
7/22/91	Pretrial memorandum by intervenor plaintiff Liberty Mutual Insurance Group, third-party defendant Gene Wilson Enterprises

* This entry was improperly docketed by the clerk of the U.S. District Court, Eastern District of Kentucky, Ashland Division. The actual file date was 6/21/90.

DATE	PROCEEDINGS
7/22/91	Witness list submitted by intervenor plaintiff Liberty Mutual Insurance Group, third-party defendant Gene Wilson Enterprises
7/22/91	Exhibit list by intervenor plaintiff Liberty Mutual Insurance Group, third-party defendant Gene Wilson Enterprises
7/23/91	Order setting pretrial conference for 11:00 p.m. on 7/26/91
7/24/91	Pretrial Memorandum by defendant Wayne Supply Company and adopts the pretrial filings of Caterpillar Inc.
7/24/91	Supplement by defendant Caterpillar Inc. regarding documents pretrial memorandum
7/26/91	General Minutes
8/12/91	Order setting final pretrial conference for 3:30 p.m. on 1/31/92
8/19/91	Amendment by plaintiff James David Lewis of pretrial memorandum
8/21/91	Response by defendant Caterpillar Inc.
8/26/91	Amendment by intervenor plaintiff Liberty Mutual Insurance Group to pretrial memorandum
8/26/91	Motion of intervening plaintiff to amend complaint and to file cross-claim
9/3/91	Objection of plaintiff to intervening plaintiff's motion to file cross-claim
9/9/91	Objection of Wayne Supply Company to intervening plaintiff's motion to file amended intervening complaint
9/12/91	Reply of Liberty Mutual Insurance Group to Wayne Supply Company's objection to filing of cross-claim

DATE	PROCEEDINGS
9/12/91	Reply of Liberty Mutual Insurance Group to plaintiff's objection to filing of cross-claim
9/26/91	Response of Whayne Supply Company to intervening plaintiff's amendment to pretrial memorandum
12/3/91	Amended Intervenor's Complaint by Intervenor Plaintiff Liberty Mutual Insurance Group
12/3/91	Cross-claim by Liberty Mutual Insurance Group against James David Lewis
1/23/92	Answer by defendant Whayne Supply Company to Amended Intervening Complaint
1/28/92	Answer by defendant Caterpillar Inc. to Amended Intervening Complaint
1/29/92	Supplement by intervenor plaintiff Liberty Mutual Insurance Group, third-party defendant Gene Wilson Enterprises regarding exhibit list
1/31/92	Supplement by defendant Caterpillar Inc. regarding witness list
1/31/92	General Minutes
2/7/92	Answer by James David Lewis to cross-claim of Liberty Mutual Insurance Group
3/12/92	Order setting final pretrial conference for 2:00 p.m. on 3/20/92
3/16/92	Order setting final pretrial conference for 1:30 p.m. on 3/23/92
3/23/92	Witness list submitted by plaintiff James David Lewis
3/23/92	Exhibit list by plaintiff James David Lewis
3/23/92	General Minutes
4/23/92	Motion of Whayne Supply Company for Summary Judgment and Motion to Dismiss

DATE	PROCEEDINGS
5/15/92	Order amending General Minutes of 3/23/92
5/22/92	Memorandum of Liberty Mutual Insurance Group in Opposition to Whayne Supply Company's Motion for Summary Judgment and Motion to Dismiss
6/10/92	Reply of Whayne Supply Company to Liberty Mutual Insurance Group's Opposition to Summary Judgment and Motion to Dismiss
7/20/92	Memorandum Opinion and Order Denying Whayne Supply Company's Motion for Summary Judgment and Motion to Dismiss
11/3/92	Supplement by defendant Caterpillar Inc. regarding exhibit list
11/12/92	Pretrial Memorandum by plaintiff James David Lewis
11/12/92	Exhibit list by plaintiff James David Lewis
11/12/92	Witness list submitted by plaintiff James David Lewis
11/17/92	Supplement by plaintiff James David Lewis regarding exhibit list
6/8/93	Agreed Order by Judge Henry R. Wilhoit Jr. Intervening complaint dismissing party Whayne Supply Company as settled
7/21/93	Motion by defendant Caterpillar Inc. to exclude testimony of alleged similar incidents
7/23/93	Order setting jury trial for 9:00 a.m. on 11/15/93
7/29/93	Response by plaintiff James David Lewis to motion to exclude testimony of alleged similar incidents
7/29/93	Response by intervenor plaintiff Liberty Mutual Insurance Group to motion to exclude testimony of alleged similar incidents
8/10/93	Reply by defendant Caterpillar Inc. to response to motion to exclude testimony of alleged similar incidents

DATE	PROCEEDINGS
8/26/93	Remark all prior docketing and missing pleadings on hard docket
10/25/93	Order denying Caterpillar Inc.'s motion to exclude testimony of alleged similar incidents
11/3/93	Motion by plaintiff for leave to schedule time of expert witness testimony of Dr. John Hunt, Mr. John Tierney, and Dr. Williams Weitzel
11/3/93	Motion by defendant Caterpillar Inc. for attorney William F. Maready to appear pro hac vice
11/9/93	Order granting motion for leave to schedule time of expert witness testimony of Dr. John Hunt on 11/16/93 at 9:00 a.m., Mr. John Tierney on 11/16/93 at 11:00 a.m., and Dr. William Weitzel on 11/17/93 at 11:00 a.m.
11/9/93	Order granting motion for attorney William F. Maready to appear pro hac vice
11/15/93	Supplement by defendant regarding documents pretrial memorandum
11/16/93	Trial minutes
11/16/93	Deposition of John P. Tierney
11/17/93	Motion by defendant Caterpillar Inc.
11/17/93	Trial Minutes
11/17/93	Memorandum by defendant Caterpillar Inc. in support of motion for directed verdict
11/18/93	Portion of Transcript filed of testimony of Wayne Coloney
11/18/93	Trial Minutes
11/18/93	Stipulation of parties of amount of hospital and medical expenses
11/19/93	Transcript filed of testimony of Wayne Coloney during Jury Trial
11/22/93	Trial Minutes
11/22/93	Trial Minutes

Date	PROCEEDINGS
11/22/93	Exhibit list of Jury Trial on 11/15/93 through 11/22/93
11/22/93	Witness list of Jury Trial of 11/15/93 through 11/22/93
11/22/93	Trial Minutes
11/22/93	Verdict for defendant Caterpillar Inc.
11/23/93	Judgment
12/3/93	Motion by plaintiff for new trial
12/3/93	Memorandum by plaintiff in support of motion for new trial
12/15/93	Response by defendant Caterpillar Inc.
12/20/93	Motion by plaintiff to extend time to file reply
12/23/93	Transcript filed of testimony of Donald Myronuk
12/23/93	Transcript filed of Testimony of William Lux
12/23/93	Transcript filed of testimony of Joseph Geier
12/30/93	Transcript filed of testimony of James Light
1/3/94	Reply by plaintiff to response to motion for new trial
1/3/94	Order granting motion to extend time to file reply
1/6/94	Motion by defendant Caterpillar Inc. for leave to file responsive memorandum
1/14/94	Reply by defendant to response to plaintiff's reply memorandum for new trial
2/1/94	Order granting motion for leave to file responsive memorandum
2/23/94	Notice of Appeal by plaintiff James David Lewis
2/25/94	Notification to 6CCA: Short Record Mailed, Appeal Package Mailed to Appellant, Copy of Docket Sheet to Parties

LAWRENCE CIRCUIT COURT

Division No. I

C.A. No. 89-CI-091

JAMES DAVID LEWIS, PLAINTIFF

v

CATERPILLAR, INC. and
WHAYNE SUPPLY COMPANY, DEFENDANTS

COMPLAINT

Comes the Plaintiff, James David Lewis, by and through counsel, and for his Complaint herein, states as follows:

1. That the Plaintiff, James David Lewis, is a resident of Louisa, Lawrence County, Kentucky.

2. That the Defendant, Caterpillar, Inc., is a corporation with its agent for service of process being CT Corporation Systems, Kentucky Home Life Building, Louisville, Kentucky 40202.

3. The Defendant, Wayne Supply Company, is a corporation with its agent for service of process being Ernest Meadors, 1400 S. 43rd Street, Louisville, Kentucky 40211.

4. The Defendants have contracted to supply goods for services in this Commonwealth and/or further knew that such goods and/or services would be used, consumed, or would affect a person in this Commonwealth and the Defendants regularly do or solicit business and engage in a persistent course of conduct or derive sub-

stantial revenue from goods used or consumed or services in this Commonwealth. Accordingly, this Court has sufficient basis so as to assert jurisdiction over the Defendants herein.

5. As the torts alleged herein were committed in Lawrence County, Kentucky this Court has the requisite jurisdiction and venue over this action.

6. On or about July 9, 1988 the Plaintiff, James David Lewis, was operating a Caterpillar D8K Tractor which had been manufactured and sold by the Defendant, Caterpillar, Inc. and which had been overhauled, serviced, and/or maintained by the Defendant, Wayne Supply Company. While in operation by the Plaintiff a hose ruptured, spraying hydraulic fluids on the engine and other parts of said machine, thereby creating a fire. As a result of this fire, the Plaintiff, James D. Lewis, was burned and was severely injured as a result of said fire.

7. The Defendant, Caterpillar, Inc., is in the business of designing, manufacturing, and/or selling such equipment and did design, manufacture, and/or sell the Caterpillar D8K Tractor which is the subject of this Complaint, which equipment was expected to and did reach the ultimate user, the Plaintiff, James David Lewis, without substantial change in its condition.

8. The fire and resulting injuries to the Plaintiff as complained of herein were the result of negligence on the part of the Defendant, Caterpillar, Inc.

9. The fire and resulting injuries to the Plaintiff as complained of herein were the result of a defect in the equipment which defect created an unreasonably dangerous condition, and which defect was present in the equipment at the time of its manufacture and sale by Caterpillar, Inc.

10. The fire and resulting injuries to the Plaintiff as complained of herein were the result of a failure of the Defendant, Caterpillar, Inc., to give proper and adequate warning of the dangerous condition of said equipment.

11. The Defendant, Wayne Supply Company, is in the business of overhauling, servicing, maintaining, and/or selling such equipment and did overhaul, service, maintain, and/or sell the Caterpillar D8K Tractor which is the subject of this Complaint, which equipment was expected to and did reach the ultimate user, the Plaintiff, James David Lewis, without substantial change in its condition.

12. The fire and resulting injuries to the Plaintiff as complained of herein were the result of negligence on the part of Wayne Supply Company.

13. The fire and resulting injuries to the Plaintiff as complained of herein were the result of a defect in the equipment, which defect created an unreasonably dangerous condition, and which defect was created at the time of the overhaul, service, and/or maintenance by Wayne Supply Company.

14. The fire and resulting injuries to the Plaintiff as complained of herein were the result of a failure of the Defendant, Wayne Supply Company, to give proper and adequate warning of the dangerous condition of the equipment.

15. The fire and resulting injuries to the Plaintiff as complained of herein were the result of a breach of both implied warranty and express warranty by both of the Defendants, Caterpillar Inc. and Wayne Supply Company.

16. As a result of the injuries complained of herein the Plaintiff has sustained reasonable and necessary medical and other related expenses, has sustained a loss of wages, both past and future, has sustained a permanent degree of impairment, has sustained much pain and suffering, has sustained mental anguish, and has sustained a general reduction in his quality of life.

17. As a result of the injuries complained of herein, the Plaintiff is likely to incur medical bills in the future,

will likely incur future loss of wages, will likely incur future pain and suffering, mental anguish, and will likely incur a general reduction in his quality of life in the future.

WHEREFORE, the Plaintiff, James David Lewis, demands judgment jointly and severally, from the Defendants, Caterpillar, Inc. and Wayne Supply Company, as follows:

1. Compensatory damages in an amount in excess of \$4,000.00 reasonably calculated so as to recompense the Plaintiff for his losses herein;
2. Punitive damages in an amount in excess of \$4,000.00 reasonably calculated so as to deter the Defendants from further like actions as were taken in this matter;
3. Pre-judgment and post-judgment interest;
4. Reimbursement of all of the Plaintiff's costs incurred herein, including, but not limited to, a reasonable attorney's fee;
5. A trial by jury; and
6. Any and all other relief to which the Plaintiff may appear entitled.

Respectfully submitted,

/s/ Leonard Stayton
LEONARD STAYTON
Attorney at Law
P.O. Box 246
Inez, Kentucky 41224

LAWRENCE CIRCUIT COURT

[Caption Omitted]

**ANSWER OF DEFENDANT,
WHAYNE SUPPLY COMPANY**

Comes now the defendant, Wayne Supply Company, by counsel, and for its Answer to the plaintiff's Complaint herein states as follows:

1. Plaintiff's Complaint as a whole and each respective claim therein fails to state a claim upon which relief may be granted.

2. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 1 and 2 of plaintiff's Complaint, and therefore deny same.

3. This defendant admits the allegations contained in Paragraph 3 of plaintiff's Complaint.

4. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 4 and 5 of plaintiff's Complaint, and therefore deny same.

5. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 6 and 7 of plaintiff's Complaint, and therefore deny same.

6. In response to Paragraphs 8, 9, and 10 of plaintiff's Complaint, this defendant is unable to admit or deny the allegations directed to defendant Caterpillar, Inc., except as any such allegations may be relevant or material to any claim against this defendant, each and every allegation contained therein is denied.

7. This defendant admits as much of Paragraph 11 of plaintiff's Complaint as alleges defendant Wayne Supply Company "is in the business of overhauling, servicing, maintaining and/or selling" equipment such as a Caterpillar D8K Tractor, but otherwise is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 11, and therefore denies same.

8. This defendant denies each and every allegation contained in Paragraphs 12, 13, and 14 of plaintiff's Complaint.

9. In response to Paragraph 15 of Plaintiff's Complaint, this defendant is unable to admit or deny the allegations directed to defendant Caterpillar, Inc., and denies each and every allegation contained in Paragraph 15 as directed to Wayne Supply Company.

10. This defendant denies each and every allegation contained in Paragraphs 16 and 17 of plaintiff's Complaint.

11. This defendant affirmatively states and alleges that the plaintiff's alleged injuries and damages, if any, were directly caused and contributed to by his own negligence in whole or in part, but for which said alleged injuries and damages, if any, would not have occurred.

12. This defendant affirmatively states and alleges that the plaintiff's injuries and damages, if any, were directly caused or contributed to by acts of third persons, and were further directly caused and contributed to by acts of third persons not parties to this action, and said acts of third persons were superseding causes of the injuries herein alleged.

13. This defendant affirmatively states and alleges that the plaintiff's claims herein are barred in whole or in part by the Kentucky Products Liability Act.

WHEREFORE, defendant, Whayne Supply Company, demands judgment that the plaintiff's Complaint against it be dismissed with prejudice, for its costs herein expended, and for all other and proper relief to which it may be entitled.

BOEHL STOPHER GRAVES
& DEINDOERFER

By: /s/ Robert M. Brooks
ROBERT M. BROOKS
Suite 2300
One Riverfront Plaza
Louisville, KY 40202
(502) 589-5980
Counsel for Defendant,
Whayne Supply Co.

[Certificate of Service Omitted]

LAWRENCE CIRCUIT COURT

[Caption Omitted]

ANSWER OF DEFENDANT CATERPILLAR, INC.

Comes the defendant, Caterpillar, Inc., and, for Answer to the Complaint herein, states and alleges as follows:

FIRST DEFENSE

The Complaint fails to state a claim against defendants upon which relief in the form of punitive damages can be granted.

SECOND DEFENSE

1. This answering defendant, partly upon information and belief, admits the allegations contained in numerical paragraphs 1, 2, 3, and 5 of the Complaint, and admits the allegations contained in numerical paragraph 4 thereof to the extent that it admits jurisdiction and that it does and is authorized to transact business in the Commonwealth.

2. This answering defendant, upon information and belief, admits so much of the allegations contained in numerical paragraph 6 of the Complaint as allege that on or about July 9, 1988, the plaintiff was operating a Caterpillar D8K tractor which had been manufactured and sold by this answering defendant, that hydraulic fluids were allegedly released from a hose, that a fire occurred and that the plaintiff sustained burns.

3. This answering defendant admits so much of the allegations contained in numerical paragraph 7 of the

Complaint as allege that this answering defendant is in the business of designing, manufacturing and/or selling equipment and did design, manufacture and sell to a first consumer the tractor mentioned in the Complaint, but this answering defendant denies that the tractor reached the plaintiff without substantial change in its original condition.

4. This answering defendant admits so much of the allegations contained in numerical paragraph 11 of the Complaint as allege that the defendant, Wayne Supply Company, is in the business of overhauling, servicing and maintaining equipment such as is mentioned in the Complaint and did sell the subject tractor, but this answering defendant denies that the tractor reached the plaintiff without substantial change in its original condition.

5. This answering defendant denies the allegations contained in numerical paragraphs 8, 9 and 10 of the Complaint and so much of the allegations contained in numerical paragraph 15 thereof as allege that the fire and injuries to the plaintiff were a result of a breach of implied or expressed warranties on the part of this answering defendant.

6. This answering defendant is without knowledge or information sufficient at this time to form a belief as to the truth of the remaining allegations contained in the Complaint, and specifically denies any and all allegations contained in the Complaint that state or infer that the subject tractor, at the time of original manufacture and delivery, was defective, unfit or unsafe for the purposes for which the tractor was intended to be used, and this answering defendant specifically denies any breach of warranties, negligence or liability on its part.

THIRD DEFENSE

The plaintiff was guilty of negligence and carelessness which was a substantial cause of the occurrence and alleged damages mentioned in the Complaint herein and

the negligence, fault and failure on his part to exercise ordinary care in the circumstances constitutes a complete bar to the plaintiff's claims for damages herein pursuant to KRS 411.320(3).

FOURTH DEFENSE

For further defense herein, this answering defendant states that the injury alleged in the Complaint occurred more than five (5) years after the date of sale of the subject tractor to the first consumer; and, accordingly, this answering defendant pleads and relies upon the presumption that the subject product was not defective, as provided in KRS 411.310(1).

FIFTH DEFENSE

For further defense herein, this answering defendant states and alleges that the design, methods of manufacture, and testing of the subject product conformed to the generally recognized and prevailing standards or the state-of-the-art in existence at the time the design was prepared and the product was manufactured; and, accordingly, this answering defendant pleads and relies upon the presumption that the product was not defective, as provided by KRS 411.310(2).

SIXTH DEFENSE

For further defense herein, this answering defendant states that the injury alleged in the Complaint would not have occurred if the product had been used in its original, unaltered and unmodified condition; and this answering defendant pleads and relies upon the provisions of the Product Liability Act of Kentucky, including KRS 411.320 and other applicable provisions of the Act.

SEVENTH DEFENSE

For further defense herein, this answering defendant states and alleges that the plaintiff's claims predicated

upon this answering defendant's alleged breach of implied warranty and breach of express warranty are barred by the limitations provisions of KRS 355.2-725 and by the terms of the express warranty which provides the remedies available under the written warranty and further provides in conspicuous words that the written warranty is expressly in lieu of any other warranties, express or implied, including any warranty of merchantability or fitness for a particular purpose, KRS 355.2-316(2); and that said claims are further barred by the provisions of KRS 355.2-318 and other applicable law.

WHEREFORE, the defendant, Caterpillar, Inc., demands that the Complaint be dismissed as against it; prays for its costs herein expended and for all further and proper relief to which it may appear entitled.

LESLIE W. MORRIS II
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507
Telephone: 606-231-3000

By /s/ Leslie W. Morris II
Attorneys for Defendant,
Caterpillar, Inc.

[Certificate of Service Omitted]

COMMONWEALTH OF KENTUCKY
LAWRENCE CIRCUIT COURT

[Caption Omitted]

**INTERVENING COMPLAINT OF
LIBERTY MUTUAL INSURANCE GROUP**

Comes Intervening Plaintiff, Liberty Mutual Insurance Group, by counsel, and for its Intervening Complaint against defendants, Caterpillar, Inc. and Whayne Supply Company, and each of them, states as follows:

1. Intervening plaintiff, Liberty Mutual Insurance Group, is an authorized insurer commissioned to transact business within the Commonwealth of Kentucky, and at all times pertinent hereto, provided Workers' Compensation insurance to plaintiff's employer, Gene Wilson Enterprises.

2. On or about July 9, 1988, in Lawrence County, Kentucky, plaintiff, James David Lewis, was an employee of Gene Wilson Enterprises and was acting within the course and scope of his employment with said employer.

3. Intervening plaintiff provided Workers' Compensation coverage to plaintiff's employer and at the time and on the occasion of said accident, plaintiff and this intervening plaintiff had both elected to and were operating under the provisions of the Workers' Compensation Act of the Commonwealth of Kentucky.

4. On the aforesaid date and occasion, plaintiff, James David Lewis, was operating a D-8K dozer manufactured by Caterpillar, when said dozer malfunctioned and caught fire causing personal injuries to plaintiff, James David Lewis, as more specifically alleged in plaintiff's Complaint

filed herein, which is incorporated herein by reference as if set out fully.

5. At all times material hereto, the defendant, Caterpillar, was engaged in the business of designing, manufacturing, selling, marketing, distributing, supplying and/or otherwise placing into the stream of commerce heavy equipment and machinery, including the dozer model D-8K which is the subject of this action.

6. The defendant, Wayne Supply Company, is and was at all times material hereto engaged in the business of repairing, and maintaining heavy equipment and selling, supplying and distributing parts and materials for said equipment and more specifically providing parts and materials and performing repairs to and maintenance on Caterpillar dozers and equipment, including the dozer previously referred to and which is the subject of this action.

7. The aforesaid Caterpillar dozer, model D-8K, that caused plaintiff's injuries and the injuries complained of were the result of carelessness and negligence of defendant, Caterpillar, its agents, servants, and employees and were further the result of breaches and violations of duties owed by defendants to plaintiff.

8. From the time the aforesaid dozer left the manufacturer, it was in a defective and unreasonably dangerous condition and as such, defendant, Caterpillar is strictly liable to plaintiff for his injuries and to this intervening plaintiff for medical and compensation benefits paid to and on behalf of plaintiff.

9. As a direct and proximate result of the carelessness and negligence of defendant, Caterpillar, and the unreasonably dangerous condition of the dozer at the time it was manufactured, sold and distributed, plaintiff sustained serious and permanent injuries and by virtue of same, this intervening plaintiff is required to and has paid through September 3, 1989 to or on behalf of plaintiff, James

David Lewis, the sum of \$20,492.89 as temporary total disability benefits, and is continuing to pay plaintiff the sum of \$333.57 per week for temporary total disability benefits, and has also paid on plaintiff's behalf \$138,253.96 in medical expenses, as required by the Workers' Compensation Act of the Commonwealth of Kentucky and will be required to pay plaintiff additional Workers' Compensation disability benefits and medical expenses incurred by him as a result of injuries he sustained on July 9, 1988.

10. The aforesaid Caterpillar dozer, Model D-8K, that caused plaintiff's injuries and the injuries complained of were the result of the carelessness and negligence of defendant, Wayne Supply, its agents, servants and employees and breaches and violations of duties owed by it to plaintiff.

11. From the time the aforesaid dozer left the manufacturer and while in the possession of and at the time it was sold by defendant, Wayne Supply, said dozer was in a defective and unreasonably dangerous condition, and, as such, defendant, Wayne Supply, is strictly liable to plaintiff for his injuries and to this intervening plaintiff for medical and compensation benefits paid to and on behalf of plaintiff.

12. As a direct and proximate result of the carelessness and negligence of defendant, Wayne Supply, by which said dozer was sold, distributed, maintained and serviced and its unreasonably dangerous condition at the time sold and distributed, plaintiff sustained serious and permanent injuries, and by virtue of same, this intervening plaintiff is required to and has paid through September 3, 1989 to or on behalf of plaintiff, James David Lewis, and is continuing to pay plaintiff the sum of \$20,492.89 as temporary total disability benefits and is continuing to pay plaintiff the sum of \$333.57 per week for temporary total disability benefits, and has also paid on plaintiff's behalf \$138,253.96 in medical expenses, as required by the Workers' Compensation Act of the Com-

monwealth of Kentucky and will be required to pay plaintiff additional Workers' Compensation disability benefits and medical expenses incurred by him as a result of injuries he sustained on July 9, 1988.

13. In accordance with the provisions of KRS 342.700 and all other applicable law, this intervening plaintiff is entitled to recover from defendants, Caterpillar and Wayne Supply, and each of them, all Workers' Compensation benefits, including medical expenses, paid or payable by this intervening plaintiff to or on behalf of plaintiff, James David Lewis.

14. In the alternative, this intervening plaintiff is entitled to judgment against defendants, Caterpillar, Inc. and Wayne Supply Company, on the basis of common law and statutory indemnity, for any and all sums which it has been, and will in the future be, compelled or required by law to pay to or on behalf of plaintiff, James David Lewis, as a result of the injuries sustained by him on July 9, 1988.

WHEREFORE, intervening plaintiff, Liberty Mutual Insurance Group, requests that it be awarded judgment granting indemnity, common law and/or statutory, from defendants Caterpillar, Inc. and Wayne Supply Company, jointly and severally, for all sums paid or payable as Workers' Compensation benefits to or on behalf of plaintiff, James David Lewis, interest on all sums paid and to be paid; for its costs herein expended; and for all other relief to which it may be entitled.

OGDEN, STURGILL & WELCH
Bank of Ashland
1422 Winchester Avenue
P.O. Box 1653
Ashland, Kentucky 41105-
1653

By: /s/ Peggy E. Purdom
PEGGY E. PURDOM
PHILLIP M. MOLONEY

Attorneys for Intervening
Plaintiff,
Liberty Mutual Insurance
Group

[Certificate of Service Omitted]

COMMONWEALTH OF KENTUCKY
LAWRENCE CIRCUIT COURT

[Caption Omitted]

ORDER

This matter having come before the Court upon the Motion of Liberty Mutual Insurance Group for Leave to File Intervening Complaint, and to issue Summons thereon; and the parties having had the opportunity to be heard; and the Court being otherwise sufficiently advised

IT IS HEREBY ORDERED AS FOLLOWS:

(1) Intervening plaintiff's Liberty Mutual Insurance Group, Motion for Leave to Intervene in this action is sustained and the Clerk of this Court is directed to file the tendered Intervening Complaint in this action as of the date of this Order.

(2) The Clerk is hereby directed to issue Summons upon the intervening Complaint to defendants Caterpillar, Inc. and Wayne Supply Company.

(3) All future pleadings in this action shall reflect Liberty Mutual Insurance Group as an intervening plaintiff and party to this action.

This 13th day of October, 1989.

/s/ Stephen N. Frazier
Judge
Lawrence Circuit Court

[Certificate of Service Omitted]

COMMONWEALTH OF KENTUCKY
LAWRENCE CIRCUIT COURT

[Caption Omitted]

**ANSWER OF DEFENDANT, CATERPILLAR INC.,
TO INTERVENING COMPLAINT**

Comes the defendant, Caterpillar Inc., and, for Answer to the Intervening Complaint of Liberty Mutual Insurance Group, states and alleges as follows:

FIRST DEFENSE

1. This answering defendant, partly upon information and belief, admits the allegations contained in numerical paragraphs 1, 2, 3 and 6 of the Intervening Complaint, and admits the allegations contained in numerical paragraph 5 thereof to the extent that it admits jurisdiction and that it does and is authorized to transact business in the Commonwealth.

2. This answering defendant denies the allegations contained in numerical paragraph 4 of the Complaint to the extent that it denies that the subject tractor malfunctioned, and, for further response, it incorporates herein by reference the allegations and defenses set forth in its Answer to the Complaint herein.

3. This answering defendant denies the remaining allegations contained in the Complaint as pertain to it and which state or infer that the subject tractor, at the time of original manufacture and delivery, was defective, unfit or unsafe for the purposes for which the tractor was intended to be used, and this answering defendant specifically denies any breach of warranties, negligence or liability on its part.

4. This answering defendant is without knowledge or information sufficient at this time to form a belief as to the truth of the other remaining allegations contained in the Complaint.

SECOND DEFENSE

For further response to numerical paragraphs 13 and 14 as pertain to it, and by way of additional response and answer to the Intervening Complaint generally, this answering defendant states that for the reasons asserted in its Answer to the plaintiff's Complaint herein, all of which are hereby adopted and reaffirmed, this defendant has incurred no legal liability to pay damages to the plaintiff and, therefore, this defendant has no legal liability to the intervening plaintiff pursuant to KRS 342.700 or otherwise.

WHEREFORE, the defendant, Caterpillar Inc., prays that the Intervening Complaint be dismissed as against it; prays for its costs herein expended and for all further and proper relief to which it may appear entitled.

LESLIE W. MORRIS II
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507
Telephone: 606-231-3000

By /s/ Leslie W. Morris II
Attorneys for Defendant,
Caterpillar Inc.

[Certificate of Service Omitted]

COMMONWEALTH OF KENTUCKY LAWRENCE CIRCUIT COURT

[Caption Omitted]

ANSWER OF DEFENDANT, WHAYNE SUPPLY COMPANY TO INTERVENING COMPLAINT

Comes now the defendant, Wayne Supply Company, by counsel, and for its answer to the Intervening Complaint of Liberty Mutual Insurance Group herein states as follows:

1. Plaintiff's Intervening Complaint as a whole and each respective claim therein fails to state a claim upon which relief may be granted.
2. This defendant adopts and incorporates herein by reference each and every defense and affirmative defense set forth in its original Answer to plaintiff's Complaint herein.
3. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 1, 2, and 3 of the Intervening Complaint, and therefore denies same.
4. This defendant denies each and every allegation contained in Paragraph 4 of the Intervening Complaint.
5. In response to Paragraph 5 of the Intervening Complaint, this defendant is unable to admit or deny the allegations directed to defendant Caterpillar, Inc., except as any such allegations may be relevant or material to any claim against this defendant, each and every allegation contained therein is denied.

6. This defendant admits as much of Paragraph 6 of the Intervening Complaint as alleges defendant Whayne Supply Company is "engaged in the business of repairing, and maintaining heavy equipment and selling, supplying and distributing parts and materials for said equipment and more specifically providing parts and materials and performing repairs to and maintenance on Caterpillar dozers and equipment," but otherwise is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6, and therefore denies same.

7. In response to Paragraphs 7, 8, and 9 of the Intervening Complaint, this defendant is unable to admit or deny the allegations directed to defendant, Caterpillar, Inc., except as any such allegations may be relevant or material to any claim against this defendant, each and every allegation contained therein is denied.

8. This defendant denies each and every allegation contained in Paragraphs 10, 11, and 12 of the Intervening Complaint.

9. In response to Paragraphs 13 and 14 of the Intervening Complaint, this defendant is unable to admit or deny the allegations directed to defendant Caterpillar, Inc., and denies each and every allegation contained in Paragraphs 13 and 14 directed to Whayne Supply Company.

10. This defendant affirmatively states and alleges that the plaintiff's alleged injuries and damages, if any, were directly caused and contributed to by his own negligence in whole or in part, but for which said alleged injuries and damages, if any, would not have occurred.

11. This defendant affirmatively states and alleges that the plaintiff's injuries and damages, if any, were directly caused or contributed to by acts of third persons, and were further directly caused and contributed to by acts of third persons not parties to this action, and said acts of

third persons were superseding causes of the injuries herein alleged.

12. This defendant affirmatively states and alleges that the plaintiff's claims herein are barred in whole or in part by the Kentucky Products Liability Act.

13. This defendant affirmatively states and alleges that this defendant has incurred no legal liability to pay damages to the plaintiff, and therefore, this defendant has no legal liability to the Intervening Plaintiff pursuant to KRS 342.700 or otherwise.

WHEREFORE, defendant, Whayne Supply Company, demands judgment that the Intervening Complaint against it be dismissed with prejudice, that the plaintiff's Complaint against it be dismissed with prejudice, for its costs herein expended, and for all other and proper relief to which it may be entitled.

BOEHL STOPHER GRAVES
& DEINDOERFER

By: /s/ Robert M. Brooks
ROBERT M. BROOKS
Suite 2300
One Riverfront Plaza
Louisville, KY 40202
(502) 589-5980

Counsel for Defendant,
Whayne Supply Company

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

C.A. No. 90-84

JAMES DAVID LEWIS, PLAINTIFF

and

LIBERTY MUTUAL INSURANCE GROUP,
INTERVENING PLAINTIFF

vs.

CATERPILLAR, INC., DEFENDANT

NOTICE OF REMOVAL

Comes the defendant, Caterpillar Inc., and, for its Notice of Removal, states as follows:

1. On June 22, 1989, a civil action was commenced by Complaint of James David Lewis against Caterpillar Inc. and Wayne Supply Company, defendants, in the Lawrence Circuit Court, Lawrence County, Kentucky, said action being designated as Civil Action No. 89-CI-091.

2. Caterpillar Inc. was served with a copy of the summons and Complaint on the 27th day of June, 1989. Copies of all process pleadings and orders served upon it in such action are attached hereto and incorporated by reference herein.

3. The defendant, Caterpillar Inc., is and was at all times referred to in the said Complaint, at the time the said action was commenced, at all intervening times, and

is now, a corporation incorporated by the State of Delaware, maintaining its principal place of business in the State of Illinois, and being a citizen of the States of Delaware and Illinois and of no other state. Caterpillar, Inc. is not now and has never been a citizen of the State of Kentucky.

4. The plaintiff, James David Lewis, is and was at all times referred to in said Complaint, at the time the said action was commenced, at all intervening times, and is now, a citizen of the State of Kentucky and of no other state. The said plaintiff is not now and was not at any of said times a citizen of the States of Delaware, Illinois or Massachusetts.

5. The case stated by the initial pleading was not removable because Wayne Supply Company was named as a defendant, together with Caterpillar Inc. Wayne Supply Company is and was at all times referred to in the said Complaint, at the time the said action was commenced, at all intervening times, as is now, a corporation incorporated by the State of Kentucky, maintaining its principal place of business in the State of Kentucky, and being a citizen of the State of Kentucky and of no other state.

6. The intervening plaintiff, Liberty Mutual Insurance Group, intervened in the action to assert a derivative subrogation claim against the defendants, Caterpillar Inc. and Wayne Supply Company, for reimbursement of workers' compensation benefits and medical expenses paid and payable to the plaintiff. Liberty Mutual Insurance Group is and was at all times, at the time its action was commenced, at all intervening times, and is now, a corporation incorporated by the State of Massachusetts, maintaining its principal place of business in the State of Massachusetts and being a citizen of the State of Massachusetts and of no other state.

7. On June 12, 1990, the defendant, Caterpillar Inc., by counsel, first learned and ascertained that the plaintiff

had voluntarily settled with the non-diverse defendant, Wayne Supply Company, and that the plaintiff's claim against said defendant was to be dismissed, reference being made to said counsel's affidavit which is attached hereto and incorporated herein. This case is now one which has become removable. The defendant, Caterpillar Inc., by counsel, has requested an amended pleading, motion, order or other paper evidencing in writing the plaintiff's settlement and dismissal or its intention to voluntarily terminate its action against the defendant, Wayne Supply Company, but no such writing has been received to date. This and the circumstances creating removability are beyond the control of Caterpillar Inc. The defendant, Caterpillar Inc., has acquired requisite knowledge of the change of circumstances warranting removal and cannot prudently wait any longer to remove in view of the one year limitation on removal based on diversity jurisdiction which is imposed by 28 U.S.C. § 1446(b).

8. The amount in controversy exceeds the sum of Fifty Thousand and No/100 (\$50,000.00) Dollars, exclusive of interest and costs.

9. This Notice of Removal is filed within thirty (30) days after the defendant, Caterpillar Inc., first ascertained that the case is one which has become removable and is filed less than one year after commencement of the action, and may be removed to this Court pursuant to 28 U.S.C. §§ 1332, 1441 and 1446(b).

WHEREFORE, Caterpillar Inc., prays that the said Civil Action No. 89-CI-091 in the Lawrence Circuit Court, be removed therefrom to the United States District Court for the Eastern District of Kentucky and proceed as an action properly removed hereto.

LESLIE W. MORRIS II
STOLL, KENNON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507
Telephone: 606-231-3000

By /s/ Leslie W. Morris II
Attorneys for Defendant,
Caterpillar Inc.

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

AFFIDAVIT

Comes Leslie W. Morris, II, after being duly sworn, and states as follows:

1. He is the attorney of record for the defendant, Caterpillar Inc., in Civil Action No. 89-CI-091, in the Lawrence Circuit Court, Lawrence County, Kentucky, and is duly authorized to act on behalf of the defendant, Caterpillar Inc., in filing the Notice of Removal of said action to the United States District Court for the Eastern District of Kentucky.

2. The statements made in the Notice of Removal are true and correct.

3. On Tuesday, June 12, 1990, this affiant received a telephone call in his office from Dave Bauer, of GAB Business Services, Inc., 2235 Enterprise Drive, Suite 3504, Westchester, Illinois 60154. Mr. Bauer had attended a deposition in this case on April 30, 1990, and stated at that time that he was in attendance as a duly authorized representative of Wayne Supply Company, a defendant in the aforesaid state action. Hon. Edward H. Stopher, attorney of record for said defendant, Wayne Supply Company, who was present at said deposition, confirmed that Mr. Bauer was such a representative. In the conversation of June 12, 1990, Mr. Bauer informed this affiant that Wayne Supply Company had effected a separate settlement with the plaintiff, James David Lewis.

4. On June 15, 1990, this affiant had a telephone discussion with Mr. Stopher who at that time had not had an opportunity to speak with Mr. Bauer; however, Mr. Stopher indicated that he had received several telephone calls from Mr. Bauer, while he (Mr. Stopher) was out of the office, and he had also learned that Wayne Supply Company had probably effected a separate settlement with the plaintiff. Mr. Stopher indicated that he would inquire in this regard and that, if this was the case, depositions scheduled for June 21, 1990, by Wayne Supply Company would be cancelled. This affiant asked for prompt confirmation in writing of the settlement and has repeated this request in a letter to Mr. Stopher dated June 15, 1990. The defendant, Caterpillar Inc., and this affiant, have not received any such writing to date but, on the afternoon of June 15, 1990, Mr. Stopher's office left word at the affiant's office that the depositions scheduled on June 21, 1990, were cancelled. This affiant expects to receive an order or other writing evidencing and confirming that the defendant, Wayne Supply Company, has effected a settlement with the plaintiff. This affiant has no reason to doubt or disbelieve the oral representations that such a settlement has been agreed upon.

LESLIE W. MORRIS II

[Jurat omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

OBJECTION TO NOTICE OF REMOVAL

Comes the Plaintiff, James David Lewis, by and through counsel, and would object to the removal of this action from the Lawrence Circuit Court, Lawrence County, Kentucky. As basis therefor, the Plaintiff, James David Lewis, would state that this Court does not have jurisdiction over the parties to this action as there is not complete diversity between the parties hereto.

Pursuant to 28 U.S.C. Section 1332 complete diversity must exist between all parties for a United States District Court to have jurisdiction of the action. In the matter at bar while the Defendant, Caterpillar, Inc., is correct that the Plaintiff has settled its claims with the Defendant, Wayne Supply Company, the claims of the Intervening Plaintiff, Liberty Mutual Insurance Group, have not been settled between Liberty Mutual Insurance Company and Wayne Supply Company. Accordingly, as Wayne Supply Company remains a party to this action and as Wayne Supply Company is a Kentucky resident diversity jurisdiction does not exist between all parties hereto.

The Plaintiff would further point out that Liberty Mutual Insurance Group is a party to this action, being an Intervening Plaintiff herein. The party whom Liberty Mutual Insurance Group insures in this matter is Gene Wilson and/or Gene Wilson Enterprises, which entity is a resident and/or is incorporated in the state of Kentucky.

Pursuant to 28 U.S.C. Section 1332 in an action where the insured is not a party the insurer is deemed to be a citizen of the state of which the insured is a citizen. Therefore, Liberty Mutual Insurance Group is deemed to be a citizen of the state of Kentucky and as Liberty Mutual Insurance Group retains a claim against Wayne Supply Company herein as reflected by the Intervening Complaint of Liberty Mutual Insurance Group, a copy of which has been attached to the Notice of Removal, there is not complete diversity between the Plaintiffs and the Defendants herein and this matter is not subject to removal as this Court does not have jurisdiction over the subject matter herein.

The Plaintiff would further submit that this matter is not ripe for removal and that the Defendant, Caterpillar, Inc., has no basis upon which to move for removal herein. 28 U.S.C. Section 1446 provides that removal may be had by a Defendant within thirty (30) days of the service of a copy of an initial pleading or within thirty (30) days after receipt by the Defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable. As the Defendant, Caterpillar, Inc., sets out in its pleadings which have been filed herein, no papers or orders have been received by the Defendants' counsel from which the Defendant, Caterpillar, Inc., would be able to ascertain that this is an action which would be removable. Accordingly, as the Defendant, Caterpillar, Inc., has not received the requisite pleadings or orders from which it would be able to deem this matter removable the Defendant, Caterpillar, Inc., has no standing upon which to request removal of this action. Accordingly, for the reasons cited hereinabove, the Plaintiff would respectfully request that removal be denied and that this matter be remanded to the Lawrence Circuit Court, Lawrence County, Kentucky.

Respectfully submitted,

/s/ Leonard Stayton
LEONARD STAYTON
Attorney at Law
P.O. Box 1386
Inez, Kentucky 41224

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

MEMORANDUM OF CATERPILLAR INC.
IN OPPOSITION TO PLAINTIFF'S
OBJECTION TO REMOVAL

MAY IT PLEASE THE COURT:

The removal in this case was proper and this Memorandum is submitted in opposition to the plaintiff's objection to removal and/or motion to remand.

I

First, the plaintiff contends that since Whayne Supply Company ("Whayne Supply") allegedly remains in the case as a defendant on the Intervening Complaint of Liberty Mutual Insurance Group ("Liberty Mutual"), there is not complete diversity between "the Plaintiffs" and "the Defendants." In the first place, the action by the plaintiff, as asserted in the Complaint, is now between citizens of different states. The intervening action by Liberty Mutual is between citizens of different states. In addition, the claims interposed by the Intervening Complaint are ancillary to the main action asserted in the Complaint. The primary purpose of an intervention by a workers' compensation carrier, such as Liberty Mutual, is to assert a subrogation right in the plaintiff's recovery. In the usual case the insurance company is not identified at and does not even participate in the trial.

The Commentary on the 1988 Revision of § 1447 discusses the ancillary jurisdiction doctrine which comes

into play when a plaintiff's claim satisfies diversity but a claim interposed by some other party does not. Again, it should be noted that there is in fact diversity on the Intervening Complaint in this case but the plaintiff in effect wants to move the defendant, Wayne Supply, from one column to another, namely from the Intervening Complaint back to the Complaint. In any event, even if the intervening claim is not measured by itself there is still federal jurisdiction because of the "relatedness" of such claim to the main claim. See 28 U.S.C.A. § 1447, Commentary, 1989 Supplement. Such cases as *Mancari v. AC & S Co., Inc.*, 683 F.Supp. 91 (D.Del. 1988), present situations analogous to the one at bar. There the plaintiff had settled with the non-diverse defendants but claimed that the case was not removable because several of the non-diverse defendants remained in the action on the diverse defendant's cross-claims. The Court found that the case was in fact removable, and that the non-diverse defendants should be realigned as third-party defendants. In so holding, the Court at 93 made several statements that are germane to this matter:

When a plaintiff voluntarily enters into a settlement with all nondiverse defendants leaving only a diverse defendant in the action, the plaintiff is deemed to have given up its right to choose the forum of the action. * * * It is not required that dismissal of the nondiverse defendants be in writing or be formalized. * * * Since the defendant's claims against third party defendants are within the court's ancillary jurisdiction, it is not necessary to find an independent basis of jurisdiction if diversity exists between the plaintiff and the remaining non-settling defendant.

See also *King Fisher Marine Service v. Hanson Development*, 717 F.Supp. 727 (D.Kan. 1987).

However, if this Court should believe that Wayne Supply's continued presence as a purported defendant

on the Intervening Complaint is material to diversity jurisdiction, then some inquiry needs to be made as to the circumstances of plaintiff's settlement with Wayne Supply which would still leave open the claim of Liberty Mutual against Wayne Supply. Even though plaintiff's settlement was only partial, i.e., with Wayne Supply, Liberty Mutual is entitled to immediate statutory subrogation as to such amount of the settlement as duplicates workers' compensation benefits and the settling parties are not allowed to unilaterally structure the settlement so as to artificially exclude those elements of damages. *Martin v. Liberal Markets*, Ky., 674 S.W.2d 7 (1984). For the reasons herein stated, this Court should not need to make such an inquiry but, suffice it to say, no parties should be allowed to manipulate or manufacture either diversity or non-diversity.

II

The plaintiff next states that 28 U.S.C. § 1332 provides that "in an action where the insured is not a party the insurer is deemed to be a citizen of the state of which the insured is a citizen." According to the plaintiff, Liberty Mutual's insured is Gene Wilson and/or Gene Wilson Enterprises, both of whom are citizens of Kentucky. However, § 1332 actually provides that "in any direct action against the insurer of a policy or contract of liability insurance, * * * to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business." This section refers to suits by an injured plaintiff directly against the insurer of the tort-feasor. *White v. United States Fidelity & Guaranty Company*, 356 F.2d 746 (1st Cir. 1966); *Carpenter v. Illinois Cent. Gulf R. Co.*, 524 F.Supp. 249 (D.La. 1981); *Irvin v. Allstate Ins. Co.*, 436 F.Supp. 575 (D.Okl. 1977). This defendant simply cannot understand how plaintiff could construe § 1332(c) as being applicable to

the situation presented here. This is not even an action against the insurer. This is an Intervening Complaint by the insurer of the injured plaintiff's employer to recover workers' compensation benefits paid and payable to the plaintiff. The insurer, Liberty Mutual, is a citizen of Massachusetts.

III

Finally, the plaintiff argues that § 1446(b) precludes a defendant from filing a notice until after its receipt of a copy of an amended pleading, motion, order or other paper showing that the case has become removable. At the same time, the plaintiff confirms the truth of the affidavit filed by Caterpillar's counsel that the plaintiff has in fact settled its claims with the defendant, Whayne Supply. The case law makes it clear that knowledge acquired by the removing defendant that plaintiff has effectively abandoned or settled its cause of action asserted against the non-diverse defendant is sufficient for removal purposes, and that non-receipt of a formal motion, order or other paper, which is totally under the control of the plaintiff and settling defendant, is not sufficient to defeat removal.

As stated in *Johnson v. Celotex Corp.*, 701 F.Supp. 553, 555 (D.Md. 1988):

Where the plaintiff's voluntary conduct terminates plaintiff's action against the resident defendant, the circumstances creating removability are wholly beyond the control of the defendant * * *. Once the plaintiff's voluntary conduct by way of dismissal, settlement or otherwise indicates an intention to discontinue plaintiff's action against the resident defendant, a non-resident defendant's right to remove arises and is controlling so long as prompt action is taken.

See also *Bumgardner v. Combustion Engineering, Inc.*, 432 F.Supp. 1289 (D.S.C. 1977); *Heniford v. American*

Motors Sale Corp., 471 F.Supp. 328 (D.S.C. 1979); *Mancari v. AC & S Co., Inc.*, supra.

Now that a one-year restriction is imposed upon removal, these cases have even more validity since parties could settle and purposely delay preparation of the formal documents until after the expiration of one year. As set forth in its counsel's affidavit, Caterpillar was informed of the settlement on June 12, 1990. This defendant waited as long as it could and then, based upon its knowledge of the settlement with the non-diverse defendant, filed its notice of removal and affidavit on June 21, 1990, since the one year deadline on removal was imminent. It is now July 5, 1990, and this defendant has still not received any paper evidencing the acknowledged settlement other than the plaintiff's statement, in its objection to removal, that Caterpillar "is correct that the Plaintiff has settled its claims" with Whayne Supply.

It is respectfully submitted that the plaintiff's objection to removal should be overruled or, assuming the objection is treated as a motion to remand, such motion should be denied.

LESLIE W. MORRIS II
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507
Telephone: 606-231-3000

By /s/ Leslie W. Morris II
Attorneys for Defendant,
Caterpillar Inc.

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

MOTION TO REMAND

Comes the Plaintiff, James David Lewis, and would respectfully request an order from this Court remanding the above-styled action to the Lawrence Circuit Court in Lawrence County, Kentucky. As basis therefor, the Plaintiff states that this Court lacks subject matter jurisdiction over the instant claim and that this matter must therefore be remanded back to state court.

As the Defendant, Caterpillar, Inc., properly states, a partial settlement has been entered into by and between James David Lewis and Wayne Supply Company. However, James David Lewis still retains a claim against Wayne Supply Company to the extent of any subrogation found to exist herein on behalf of Liberty Mutual Insurance Group by virtue of benefits paid to the Plaintiff, James David Lewis, pursuant to the Kentucky workers' compensation policy which covered James David Lewis at the time of the accident involved herein. In addition, not even considering the claim of James David Lewis which still exists against Wayne Supply Company, Wayne Supply Company remains as a Defendant to this action while James David Lewis remains the Plaintiff to this action.

In the absence of complete diversity of citizenship between all Plaintiffs and all Defendants subject matter jurisdiction of an action does not exist by virtue of 28 U.S.C. Section 1332. *Trivett v. Bank of Delaware*, 421

F. Supp. 827 (D.C., Del., 1976). A presumption exists against diversity jurisdiction out of the regard for the rightful independence of state governments and said presumption requires federal courts to confine jurisdiction to the precise limits established by Congress. *Fleming v. Mack Trucks, Inc.*, 508 F. Supp. 917 (E.D., Pa., 1981). In the matter at bar, as there is not complete diversity of citizenship between all parties hereto as David Lewis is a citizen of the state of Kentucky and as Wayne Supply Company is a citizen of Kentucky, subject matter jurisdiction of this claim does not exist in this Court.

Since the Federal Rules of Civil Procedure do not create or withdraw jurisdiction and as complete diversity is required between all Plaintiffs and all Defendants a Plaintiff may not sue a non-diverse Defendant along with a diverse Defendant in the absence of an independent basis for federal jurisdiction and judicial economy does not authorize a District Court to exercise ancillary jurisdiction over such a claim. *Lamar Haddox Contractor, Inc. v. Potashnick*, 552 F. Supp. 11, 37 F.R. Service 2d 1024 (M.D. La., 1982). Accordingly, as there are non-diverse Plaintiffs and Defendants in this action subject matter jurisdiction does not exist.

While the Defendant, Caterpillar, Inc., may argue that Liberty Mutual is the true party in interest pursuing the claim herein this argument must fail as James David Lewis continues to pursue a claim against Wayne Supply Company with a regard to the benefits paid to him pursuant to the policy of workers' compensation herein. Under the rule that when an action is brought for the use of another, a court may recognize only the person in whose name the action is brought as a Plaintiff, the citizenship of a personal injury Plaintiff who commenced the action for his own use and use of a partially subrogated workmens compensation insurance carrier controls for the purpose of determining diversity jurisdiction under 28 U.S.C. Section 1332. The citizenship of the insurer need

not be considered since the insurer is not a party which needs to be joined under Rule 19. *Jefferson v. Ametek, Inc.*, 86 F.R.D. 425, 30 F.R. Service (D.C. Nd., 1980). While the practical needs of enabling federal courts to protect legal rights or to effectively resolve an entire, logically entwined lawsuit are the basis of the doctrine of ancillary jurisdiction, neither the convenience of the litigants nor considerations of judicial economy can suffice to justify the extension of the doctrine of ancillary jurisdiction to a cause of action against a third-party defendant who is a citizen of the same state as the Plaintiff in a diversity of citizenship case pursuant to 28 U.S.C. Section 1332 (a) (1). *Owen Equipment and Erection Company v. Kroger*, 437 U.S. 365, 57 L. Ed. 2d 274, 98 S. Ct. 2396 (1978). Thus, as the Plaintiff, James David Lewis, and the Defendant, Wayne Supply Company, are residents of the state of Kentucky diversity jurisdiction in this matter does not exist pursuant to 28 U.S.C. Section 1332 and this matter must therefore be remanded to the Lawrence Circuit Court in Lawrence County, Kentucky. Accordingly, for the reasons set out hereinabove and also for the reasons set out in the previous Objection to Removal filed herein, the Plaintiff would respectfully request that this matter be remanded to the state court.

Respectfully submitted,

/s/ Leonard Stayton
LEONARD STAYTON
Attorney at Law
P.O. Box 1386
Inez, Kentucky 41224

[Certificate of Service Omitted]

COMMONWEALTH OF KENTUCKY
LAWRENCE CIRCUIT COURT
DIVISION 1

No. 89-CI-091

JAMES DAVID LEWIS, PLAINTIFF
and

LIBERTY MUTUAL INSURANCE GROUP,
INTERVENING PLAINTIFF

v.

CATERPILLAR, INC. and WHAYNE SUPPLY CO.,
DEFENDANTS

**AGREED ORDER DISMISSING CLAIMS
AGAINST WHAYNE SUPPLY CO.**

The court being sufficiently advised that plaintiff James David Lewis has compromised and settled a disputed claim against defendant Wayne Supply Company only,

IT IS HEREBY ORDERED that plaintiff's complaint against Wayne Supply Company only shall be and hereby is DISMISSED, with prejudice, with each party to pay its own costs.

There being no just cause for delay, this is a final and appealable order.

/s/ Stephen N. Frazier
Judge, Lawrence Circuit Court

Date August 2nd, 1990

SEEN AND AGREED TO BY:

/s/ James David Lewis
JAMES DAVID LEWIS
Plaintiff

/s/ Leonard J. Stayton
LEONARD J. STAYTON, ESQ.
P.O. Box 1386
Inez, Kentucky 4124
(606) 298-5117
Counsel for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

**RESPONSE OF CATERPILLAR INC.
IN OPPOSITION TO PLAINTIFF'S
MOTION TO REMAND**

MAY IT PLEASE THE COURT:

While the plaintiff does not concede the merits of Caterpillar's Memorandum in opposition to his Objection to Notice of Removal, he seems to take a new path in his more recent Motion to Remand, namely that the plaintiff himself still has a claim against Whayne Supply Company ("Whayne Supply").

The plaintiff cites cases in his Motion but they do not have specific application to the facts of this case. The plaintiff bases his Motion on his unsworn statement that he has settled with Whayne Supply but "still retains a claim against Whayne Supply Company to the extent of any subrogation found to exist herein on behalf of Liberty Mutual Insurance Group by virtue of benefits paid to the Plaintiff, James David Lewis, pursuant to the Kentucky workers' compensation policy which covered James David Lewis at the time of the accident involved herein"; and, at another point, the plaintiff states that he "continues to pursue a claim against Whayne Supply Company with a regard to the benefits paid to him pursuant to the policy of workers' compensation herein."

Caterpillar, speaking by counsel, does not understand what the plaintiff means. Has he settled with Whayne Supply or not? It seems that plaintiff is saying that he

has settled with Whayne Supply but that, if Liberty Mutual Insurance Group is entitled to some of the settlement proceeds, then he has reserved a claim against Whayne Supply for recovery of any money he has to pay to the workers' compensation carrier subrogee. This would be a most bizarre settlement to say the least. When is the last time that a defendant "settled" but remained in the case as a legitimate defendant, still subject to substantial additional exposure, still incurring the costs of defense and so on?

Frankly, it seems to this defendant that plaintiff recognizes that the only way he can possibly defeat diversity jurisdiction is to create some artifice whereby he can say that Whayne Supply remains as an original defendant.

The only sworn statement in this record is the affidavit of Caterpillar's undersigned counsel that he had been informed that Whayne Supply had settled with the plaintiff. Nowhere in the plaintiff's prior Objection did he state or contend that he had retained any claims against Whayne Supply. To the contrary, he specifically stated that Caterpillar "is correct that the Plaintiff has settled its claims with" Whayne Supply. The plaintiff offers nothing in support of his current Motion to Remand except his unsworn, contradictory statement that he has retained some sort of vague claim against Whayne Supply. The plaintiff has filed no settlement agreement, no "partial" release, no documents to support his contention of a retained action against Whayne Supply which would leave it in this case as a legitimate, real party defendant.

The plaintiff's Motion to Remand should be denied but, as stated in this defendant's earlier memorandum, if this Court has some doubt on the matter then some inquiry needs to be made as to the circumstances and conditions of plaintiff's settlement with Whayne Supply. If such an inquiry reveals that there is not true diversity, that is one thing; but Caterpillar does not want to be victimized by gamesmanship. This Court has the right to require an

evidentiary hearing or, in the alternative, this defendant requests an opportunity to develop the facts in this matter if the Court has any doubt. See *Stifel v. Hopkins*, 477 F.2d 1116, 1126 (6th Cir. 1973).

However, this defendant believes that it has made a prima facie showing of diversity jurisdiction. It is submitted that the plaintiff has failed to bear his burden to properly show otherwise. The Motion to Remand should be denied.

LESLIE W. MORRIS II
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507
Telephone: 606-231-3000

By /s/ Leslie W. Morris II
Attorneys for Defendant,
Caterpillar Inc.

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

**SUPPLEMENTAL RESPONSE OF CATERPILLAR INC.
IN OPPOSITION TO PLAINTIFF'S
MOTION TO REMAND**

MAY IT PLEASE THE COURT:

The defendant, Caterpillar Inc., forwarded to the Court, on August 6, 1990, its Response to plaintiff's Motion to Remand. The defendant has today received in the mail the attached Agreed Order, dated August 2, 1990, whereby plaintiff's Complaint against Wayne Supply Company is dismissed, with prejudice. This is an unconditional Order which dismisses all claims of the plaintiff against Wayne Supply Company.

LESLIE W. MORRIS II
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507
Telephone: 606-231-3000

By /s/ Leslie W. Morris II
Attorneys for Defendant,
Caterpillar Inc.

[Certificate of Service Omitted]

[Filed Sep. 24, 1990]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

Civil Action No. 90-84

JAMES DAVID LEWIS, PLAINTIFF,
LIBERTY MUTUAL INSURANCE GROUP,
INTERVENING PLAINTIFF,

vs.

CATERPILLAR, INC. and WHAYNE SUPPLY CO.,
DEFENDANTS.

MEMORANDUM OPINION AND ORDER

This matter is before the court upon plaintiff's motion to remand this action to state court.

In his complaint, plaintiff seeks damages for personal injuries. He alleges that he was operating a tractor manufactured by defendant Caterpillar and serviced by defendant Wayne Supply when a hose ruptured, spraying hydraulic fluid on the engine causing a fire. Plaintiff was burned and injured. Plaintiff did not name as a defendant his employer, Gene Wilson Enterprises. Liberty Mutual paid worker's compensation benefits to plaintiff and has intervened on a claim of indemnity.

The action was originally filed in Lawrence Circuit Court. Defendant Caterpillar removed the case to federal court on the basis of diversity jurisdiction when it learned, or had reason to believe, that plaintiff had settled his claim against defendant Wayne Supply. Plaintiff is a

Kentucky resident; intervening plaintiff is a Massachusetts corporation with its principal place of business in Massachusetts; defendant Caterpillar is a Delaware corporation with its principal place of business in Illinois; Whayne Supply is a Kentucky corporation with its principal place of business in Kentucky; Gene Wilson Enterprises is a Kentucky citizen.

In his motion to remand, plaintiff argues that the case is not ripe for removal as there is a lack of diversity among the parties. Plaintiff provides two bases for this argument, neither of which are meritorious.

Plaintiff first argues that there is a lack of diversity between himself and Liberty Mutual as Liberty Mutual takes on the citizenship of its insured, Gene Wilson Enterprises, a Kentucky citizen. In support of this argument plaintiff relies upon the following fragment from 28 U.S.C. § 1332(c)(1): in any action in which "the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen. . . ." Plaintiff's reliance is misplaced. A more complete reading of the statute follows:

[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance . . . to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen . . .

This case is not a "direct action against the insurer." Plaintiff's complaint contains no claim whatsoever against the insurer, Liberty Mutual. The insurer has intervened on a claim of indemnity and pursuant to the above quoted statute is a citizen only of its state of incorporation and the state of its principal place of business—Massachusetts.

Plaintiff next argues that there is a lack of diversity between himself and defendant Whayne Supply, both Kentucky citizens. Plaintiff points to the record which is devoid of and indication that he has settled his claim against Whayne Supply or that Whayne Supply has been dismissed. Plaintiff makes this argument while admitting in his motion that he has in fact settled his claim against Whayne Supply. His argument rests entirely upon the contents of the record. This argument fails for two reasons.

First, since the date the present motion was filed, a copy of an agreed order from the Lawrence Circuit Court dated August 2, 1990 has been filed in the record which states that plaintiff has settled all claims it may have had against Whayne Supply and that Whayne Supply is dismissed from this action. This order was entered approximately five weeks after the case was removed to federal court. The Lawrence Circuit Court had no authority to enter this order as it lost jurisdiction over the case when removal was effected. 28 U.S.C. § 1446(d). However, because it is styled as an agreed order, the court will construe it as a stipulation that plaintiff has settled all claims it may have had against Whayne Supply.

Second, the fact that in his motion plaintiff admits that he has settled all claims he may have had against Whayne Supply is dispositive. The presence or absence of formal documentation in the record is not controlling. If it were otherwise, plaintiff could successfully prevent removal to federal court by refusing to provide the state court with documentation of settlement until after the one year period provided by 28 U.S.C. § 1446 for removal of action based on diversity had elapsed.

Accordingly,

IT IS THEREFORE ORDERED AND ADJUDGED:

(1) That plaintiff's motion to remand is **DENIED**;

(2) That, as to defendant Whayne Supply, plaintiff's complaint is DISMISSED with prejudice and plaintiff shall take nothing thereby.

This 24 day of September, 1990.

/s/ Henry R. Wilhoit, Jr.
HENRY R. WILHOIT, JR.
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

AMENDED INTERVENING COMPLAINT
AND CROSS-CLAIM

Comes Intervening Plaintiff, Liberty Mutual Insurance Group, by counsel, and for its Amended Intervening Complaint against Defendants, Caterpillar, Inc. and Whayne Supply Company, and each of them, states as follows:

JURISDICTION

1. Intervening Plaintiff, Liberty Mutual Insurance Group ("Liberty Mutual"), is an authorized insurer commissioned to transact business within the Commonwealth of Kentucky, and at all times pertinent hereto, provided Workers' Compensation insurance to plaintiff's employer, Gene Wilson Enterprises.
2. Defendant, Caterpillar, Inc. ("Caterpillar"), is a Delaware corporation, having its principal place of business at 100 N.E. Adams Street, Peoria, Illinois 61629.
3. Defendant, Whayne Supply Company ("Whayne Supply"), is a Kentucky corporation registered and qualified to do business within the Commonwealth of Kentucky and its principal place of business in Kentucky is 1400 South 43rd Street, Louisville, Kentucky.
4. Plaintiff, James David Lewis ("Lewis"), is a resident of Lawrence County, Kentucky and Intervening Plaintiff's Cross-Claim is brought against plaintiff pursuant to Fed.R.Civ.P. 13(8) solely for the purpose of

asserting a subrogation right against settlement proceeds received by plaintiff from Whayne Supply Company to the extent that said proceeds duplicate benefits which Intervening Plaintiff has previously paid Lewis directly or on his behalf.

5. At all times mentioned herein, Intervening Plaintiff, Liberty Mutual Insurance Group, provided Workers' Compensation coverage to plaintiff's employer, Gene Wilson Enterprises, Incorporated, and on July 9, 1988, the date plaintiff was injured, plaintiff and this Intervening Plaintiff had both elected to act and were acting under the provisions of the Workers' Compensation Act of the Commonwealth of Kentucky.

6. Plaintiff's cause of action was originally filed in state court in the Lawrence County Circuit Court on June 22, 1990. Within one year of the filing of said action, plaintiff entered into a settlement with defendant, Whayne Supply Company. Defendant, Caterpillar, Inc., then sought and obtained removal of this action to the United States District Court on June 21, 1990. Plaintiff's claims against defendant, Whayne Supply Company, were dismissed with prejudice by Agreed Order entered by the Lawrence Circuit Court on August 2, 1990.

COUNT I

(CLAIM FOR STRICT LIABILITY)

Plaintiff reiterates, adopts and incorporates by reference all previous allegations set forth herein and further alleges as follows:

7. On July 9, 1988, in Lawrence County Kentucky, plaintiff, James David Lewis, while acting within the course and scope of his employment with Gene Wilson Enterprises, Incorporated was operating a D8K dozer/tractor manufactured by Caterpillar, when a hydraulic hose thereon burst, spewing hydraulic fluid onto the trac-

tor's exhaust manifold and exhaust system and plaintiff operator, causing personal injuries to plaintiff.

8. Defendant, Caterpillar, Inc., is among other things, a manufacturer and distributor of heavy equipment, including the D8K series tractor.

9. The subject Caterpillar D8K tractor was manufactured, sold and distributed by one or more of defendants, namely, Caterpillar, Inc. and Whayne Supply Company.

10. At the time and on the occasion set forth above, said D8K tractor was being used in its intended manner or in a manner reasonably foreseeable to defendants.

11. Defendant, Whayne Supply Company, is among other things, a distributor and retail seller of Caterpillar products, including the Caterpillar D8K tractor series, and also is engaged in maintaining, servicing and repairing Caterpillar products, including D8K's at request of customers.

12. At the time said D8K tractor was manufactured, marketed, designed, distributed and sold by defendants, said defendants were engaged in the business of marketing, manufacturing, designing and selling such products as and including the D8K tractor model which is the subject of this action. Defendants should be held strictly liable for plaintiff's injuries because the subject D8K tractor was manufactured, designed and sold in a defective condition unreasonably dangerous for the purpose for which it was intended.

13. Said D8K tractor was expected to and did reach the intended user and consumer without substantial change in the defective and unsafe condition in which it was designed, manufactured, distributed and sold.

14. Plaintiff's, James David Lewis, burns and injuries are the direct and proximate result of the design, manu-

facture, sale and distribution of the said defective and unreasonably dangerous D8K tractor.

COUNT II

(CLAIM FOR BREACH OF WARRANTY)

Intervening plaintiff, Liberty Mutual, reiterates, adopts, and incorporates by reference all previous allegations set forth herein and further alleges as follows:

15. Defendants, Caterpillar and Whayne Supply, as sellers, designers, manufacturers and distributors of the D8K series tractors including the subject D8K tractor which is the subject of this action, impliedly made and/or expressly warranted that said products were reasonably fit for the general uses and purposes for which they were intended; and that said product was free of defects in design, manufacture, assembly or construction which would cause an unreasonable risk of injury to persons reasonably expected to use or be near said product, including plaintiff, James David Lewis.

16. The burns and injuries sustained by plaintiff were a direct and proximate result of defendants' failure to comply with said implied and/or expressed warranties, and said D8K tractor was not reasonably fit for the general uses and purposes for which it was intended.

COUNT III

(CLAIM FOR NEGLIGENT MANUFACTURE/DESIGN)

Intervening plaintiff, Liberty Mutual, reiterates, adopts, and incorporates by reference all previous allegations set forth herein and further alleges as follows:

17. Defendants, Caterpillar and Whayne Supply, negligently manufactured, designed, assembled, marketed and sold said D8K tractor in such a manner that it created an

unreasonable risk of physical harm and injury to reasonably foreseeable and intended users of same, including plaintiff, and that said negligence included, but was not limited to, improper and dangerous design, construction, assembly, testing, inspection, failure to warn of the unreasonably dangerous condition of said products in their design or manufacture, and the continued design, manufacture, sale and distribution of said product after defendants knew, or should have known, through the exercise of reasonable care, that said product was defective, unsafe and dangerous and constituted an unreasonable risk of harm and injury to foreseeable and intended users of same, including plaintiff, James David Lewis.

18. The burns and injuries sustained by plaintiff, James David Lewis, and the damages resulting therefrom, are the direct and proximate result of the aforesaid negligence on part of defendants.

COUNT IV

(CLAIM BASED UPON ORDINARY OR COMMON LAW NEGLIGENCE IN MAINTAINING, SERVICING & REPAIRING)

Intervening plaintiff, Liberty Mutual, reiterates, adopts, and incorporates by reference each and every allegation previously set forth and further alleges as follows:

19. Defendant, Whayne Supply, besides distributing and selling Caterpillar equipment, is in the business of maintaining, servicing, repairing and inspecting Caterpillar products, including the D8K series Caterpillar tractor.

20. Defendant, Whayne Supply, sold the subject D8K tractor in its newly manufactured condition in September of 1981 following its manufacture by defendant, Caterpillar.

21. At the time Defendant, Whayne Supply, sold the subject D8K tractor, the subject tractor was sold new and the same was sold without substantial change or altera-

tion from the condition in which it was designed, manufactured, distributed and received by Wayne Supply from Caterpillar.

22. From and following the date said D8K tractor was sold by Wayne Supply in September, 1981, Wayne Supply, by and through its employees, agents and servants, maintained, serviced and made various repairs to the subject D8K tractor including the period during which it was owned and/or used by Gene A. Wilson Enterprises, Incorporated, plaintiff's employer, up through July 9, 1988, the date plaintiff was injured.

23. Defendant, Wayne Supply, by and through its employees, agents and servants, inspected, serviced, maintained and repaired the subject tractor at the request of Gene A. Wilson or his employees, agents or servants on various occasions during the weeks and months preceding July 9, 1988.

24. Defendant, Wayne Supply, was negligent, among other things, in maintaining, servicing, repairing and inspecting the subject D8K tractor, including but not limited to detecting and replacing a worn or frayed hydraulic lift hose, failing to detect dangerous conditions and/or defects with respect to said tractor and failing to warn Gene A. Wilson Enterprises, Incorporated or its employees, including James David Lewis, of unreasonably dangerous conditions relating to said tractor.

25. Defendant, Wayne Supply, in inspecting, maintaining, servicing and repairing said tractor, knew or should have known of dangerous defects and/or conditions relating to said tractor and failed to exercise ordinary and reasonable care in the performance of its maintaining, servicing, repairing and inspection of said tractor, and in advising the owner or users of said tractor as to dangerous conditions affecting the same.

26. The burns and injuries sustained by plaintiff, James David Lewis, and his damages resulting therefrom,

are the direct and proximate result of the aforesaid negligence on part of defendant, Wayne Supply Company.

COUNT V (DAMAGES)

Intervening plaintiff, Liberty Mutual, reiterates, adopts and incorporates by reference each and every allegation previously set forth and further alleges as follows:

27. As a direct and proximate result of the negligence of defendants, Caterpillar, Inc. and Wayne Supply Company as previously alleged and their breaches of warranties and strict liability as previously specified, including the ordinary and common law negligence of Wayne Supply in maintaining, servicing, repairing and/or inspecting the subject tractor of its customer Gene Wilson Enterprises, Incorporated, plaintiff, James David Lewis, sustained serious and permanent injuries and burns to his arms, hands, neck, face, abdomen, legs, and the following damages, including permanent scarring and disfigurement, past and future pain and suffering, lost wages, past and future medical expenses, and impairment of his power to earn a living.

28. As a direct and proximate result of the negligence of defendants, Caterpillar, Inc. and Wayne Supply Company, as previously alleged and their breaches of warranties and strict liability as previously specified, including the ordinary and common law negligence of Wayne Supply in maintaining, servicing, repairing and/or inspecting the subject tractor of its customer, all of which caused plaintiff's injuries and damages as previously stated, this intervening plaintiff was required to and has paid through August 15, 1991, to or on behalf of James David Lewis, income benefits in the amount of \$37,349.90 as temporary total disability benefits and medical benefits in the amount of \$166,292.22, and is continuing to pay all Workers' Compensation benefits as required by

the Workers' Compensation Act of the Commonwealth of Kentucky incurred by plaintiff as a result of injuries he sustained on July 9, 1988.

29. In accordance with the provisions of KRS 342.700 and all other applicable law, this intervening plaintiff is entitled to recover from defendants, Caterpillar, Inc. and Wayne Supply Company, and each of them, all Workers' Compensation benefits, including medical expenses, paid or payable by this Intervening Plaintiff to or on behalf of plaintiff, James David Lewis.

30. In the alternative, intervening plaintiff is entitled to judgment against defendants, Caterpillar, Inc. and Wayne Supply Company, on the basis of common law and statutory indemnity, for any and all sums which it has been, and in the future may be, compelled or required by law to pay to or on behalf of plaintiff, James David Lewis, as a result of injuries sustained by him on July 9, 1988.

CROSS-CLAIM

(CROSS-CLAIM FOR STATUTORY SUBROGATION AGAINST PLAINTIFF, JAMES DAVID LEWIS)

For its Cross-Claim against plaintiff, James David Lewis, Intervening Plaintiff, Liberty Mutual, alleges as follows:

Intervening Plaintiff, Liberty Mutual, is the worker's compensation carrier for plaintiff's employer, Gene Wilson Enterprises, Incorporated, for whom plaintiff was working on July 9, 1988, the day plaintiff was injured.

2. Both plaintiff and his employer, Gene Wilson Enterprises, Incorporated, had elected to act and were acting under the provisions of the Worker's Compensation Act on July 9, 1988.

3. As a result of plaintiff's injuries sustained while in the employ of Gene Wilson Enterprises, Incorporated,

Intervening Plaintiff's insured, Intervening Plaintiff has paid plaintiff through August 15, 1991, in accordance with the provisions of the Worker's Compensation Act, the sum of \$37,349.90 as income benefits and \$166,292.22 for medical benefits.

4. Pursuant to KRS 342.700, Intervening Plaintiff is granted statutory subrogation rights not to exceed the indemnity paid and payable to the injured employee, namely, plaintiff, James David Lewis.

5. Plaintiff and defendant, Wayne Supply Company, have entered into a settlement agreement resulting in release by plaintiff of all claims he has against Wayne Supply Company. Intervening Plaintiff was not consulted by either plaintiff or Wayne Supply Company regarding said settlement nor was it a participant in such settlement. As a result of said settlement, plaintiff received substantial monetary consideration compensating him for damages he sustained by virtue of the fire and resulting injuries that occurred on July 9, 1988.

6. Intervening Plaintiff is entitled to be reimbursed and to recover judgment against plaintiff for those elements of damages which he has been compensated for by virtue of his settlement with Wayne Supply to the extent that plaintiff's settlement recovery duplicates or represents amounts previously paid by Intervening Plaintiff to plaintiff for lost wages and medical expenses.

7. Intervening Plaintiff is entitled to have a fair and impartial determination as to what portion of plaintiff's settlement with Wayne Supply Company represents or duplicates worker's compensation benefits which Intervening Plaintiff has previously paid to or on behalf of plaintiff, and to the extent that there is duplication, Intervening Plaintiff is entitled to a judgment in the amount so determined.

WHEREFORE, Intervening Plaintiff, Liberty Mutual Insurance Group, requests on its Complaint and Amended

Complaint against Caterpillar, Inc. and Whayne Supply Company, that it be awarded judgment granting indemnity, common law and/or statutory, from defendants, Caterpillar, Inc. and Whayne Supply Company, jointly and severally, for all sums paid or payable as workers' compensation benefits to or on behalf of plaintiff, James David Lewis, together with interest on all sums paid and to be paid; and requests on its Cross-Claim against plaintiff, James David Lewis, judgment reimbursing Intervening Plaintiff from the settlement proceeds received from Whayne Supply Company for any duplication of worker's compensation benefits which plaintiff has received and for which Intervening Plaintiff has previously paid to or on behalf of plaintiff; for its costs herein, expended; and for all other relief to which it may be entitled, including a jury determination of all issues regarding liability and damages, including what damages the settlement between plaintiff and Whayne Supply represent.

OGDEN, STURGILL & WELCH

By: /s/ Phillip M. Moloney
 PHILLIP M. MOLONEY
 155 East Main Street
 Lexington, Kentucky 40507
 Telephone: (606) 255-8581
 Attorneys for Intervening
 Plaintiff and Third-Party
 Defendant

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF KENTUCKY
 ASHLAND

 [Caption Omitted]

ORDER

This matter is before the Court on a motion by intervening plaintiff to amend its intervening complaint. Specifically, intervening plaintiff seeks to assert a cross-claim against plaintiff and to assert a new claim of common law negligence against Whayne Supply, defendant on the intervening complaint.

At the July 26, 1991 pre-trial conference on this matter, parties were given until August 26, 1991 to file amendments to their complaints. Since intervening plaintiff's motion to amend was filed on August 26, 1991, it was timely and will be allowed.

Accordingly,

IT IS THEREFORE ORDERED:

(1) That intervening plaintiff's motion to amend its intervening complaint is GRANTED;

(2) That the tendered amended intervening complaint and cross-claim will be deemed FILED as of the date of entry of this order.

This 3 day of Dec. 1991.

/s/ Henry R. Wilhoit, Jr.
 HENRY R. WILHOIT, JR.
 Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

**WHAYNE SUPPLY COMPANY'S ANSWER TO
LIBERTY MUTUAL INSURANCE GROUP'S
AMENDED INTERVENING COMPLAINT**

Defendant, Wayne Supply Company, for its answer to Liberty Mutual Insurance Group's amended intervening complaint states as follows:

FIRST DEFENSE

1. Wayne Supply Company adopts and incorporates by reference each and every defense set forth in its original answer to Liberty Mutual Insurance Group's amended intervening complaint.

2. Wayne Supply is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraphs 1, 2, 5, 7 and 10 of the amended intervening complaint and, therefore, denies these allegations.

3. The allegations in paragraph 4 is directed at a party other than Wayne Supply, and Wayne Supply Company lacks sufficient knowledge to form a belief as to their truth or falsity and, therefore, denies these allegations.

4. Wayne Supply Company admits the allegations in paragraphs 3, 6, 8, 11, 20 and 21.

5. Wayne Supply Company admits paragraph 9 insofar as it alleges that at one time, Wayne Supply Com-

pany sold and distributed a Caterpillar D8K tractor alleged by Liberty Mutual Insurance Group to have been involved in the incident which is the subject matter of this lawsuit.

6. In response to paragraph 12 of the amended intervening complaint, Wayne Supply Company is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations directed to defendant, Caterpillar, Inc. and, therefore denies these allegations. However, Wayne Supply Company admits paragraph 12 insofar as it alleges that at the time the D8K tractor alleged to be involved in the incident which is the subject matter of this lawsuit was sold by Wayne Supply Company, Wayne Supply Company was engaged in the business of selling such products, but the remaining allegations in paragraph 12 are denied.

7. Wayne Supply Company denies the allegations in paragraphs 13, 14, 16, 17, 18, 24, 25, 26, 27, 28, 29 and 30.

8. In response to paragraph 15 of the amended intervening complaint, Wayne Supply Company is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations directed to defendant, Caterpillar, Inc., but the allegations directed to Wayne Supply Company in paragraph 15 are denied.

9. Wayne Supply Company admits paragraph 19 insofar as it alleges that Wayne Supply Company is in the business of distributing, selling, maintaining, servicing and repairing Caterpillar products, including the D8K series Caterpillar tractor, but the remaining allegations in paragraph 19 are denied.

10. Wayne Supply Company admits the allegations in paragraph 22 insofar as it alleges that Wayne Supply Company serviced and made repairs to the D8K tractor alleged by the intervening plaintiff to be involved in the

incident which is the subject matter of this lawsuit, including the period in which it was owned or used by Gene A. Wilson Enterprises, Inc., up through July 9, 1988, but the remaining allegations are denied.

11. Wayne Supply Company admits paragraph 23 insofar as it alleges that Wayne Supply Company served and repaired the tractor alleged by the intervening plaintiff to have been involved in the incident which is the subject matter of this lawsuit at the request of Gene A. Wilson or his employees, agents or servants on occasions preceding July 9, 1988, but the remaining allegations in paragraph 23 are denied.

12. Wayne Supply Company denies each and every allegation contained in the intervening plaintiff's amended complaint not specifically admitted.

SECOND DEFENSE

13. The complaint fails to state a claim upon which relief can be granted against Wayne Supply Company.

THIRD DEFENSE

14. The plaintiff, James David Lewis, failed to exercise ordinary care for his own safety, and his negligence was the sole or substantial factor in causing his alleged injuries and damages.

FOURTH DEFENSE

15. The injuries and damages complained of by the plaintiff, James David Lewis, were caused by independent, intervening or superseding acts of negligence of ~~third~~ parties over whom Wayne Supply Company has no control and for whom Wayne Supply Company has no legal responsibility.

FIFTH DEFENSE

16. The intervening plaintiff's claims are barred in whole by the Kentucky Products Liability Act.

SIXTH DEFENSE

17. Wayne Supply Company has incurred no legal liability to pay damages to the plaintiff and, therefore, Wayne Supply Company has no legal liability to the intervening plaintiff, pursuant to KRS 342.700 or otherwise.

WHEREFORE, Wayne Supply Company demands:

- (a) That the amended intervening complaint against it be dismissed with prejudice;
- (b) Its costs incurred;
- (c) All other relief to which it may appear entitled.

/s/ Catherine C. Young
 JOHN L. TATE
 CATHERINE CRAWFORD YOUNG
 STITES & HARBISON
 600 West Main Street
 Louisville, Kentucky 40202
 Telephone: (502) 587-3400
 Counsel for Defendant,
 Wayne Supply Company

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

**ANSWER OF DEFENDANT, CATERPILLAR INC.,
TO AMENDED INTERVENING COMPLAINT**

Comes the defendant, Caterpillar Inc., and, for Answer to the Amended Intervening Complaint of the intervening plaintiff, Liberty Mutual Insurance Group, states and alleges as follows:

FIRST DEFENSE

1. This answering defendant, partly upon information and belief, admits the allegations contained in numerical paragraphs 1, 2, 3, 5, 8, 9, 11, 19, 21 and 23 of the Amended Intervening Complaint.

2. This answering defendant, partly upon information and belief, admits the allegations contained in numerical paragraph 4 of the Amended Intervening Complaint except the applicability of Fed.R.Civ.P. 13(8) and admits the allegations contained in paragraph 6 except it denies that the plaintiff's cause of action was originally filed on June 22, 1990, i.e., the action having been filed on June 22, 1989.

3. This answering defendant admits so much of the allegations contained in numerical paragraph 7 of the Amended Intervening Complaint except it denies the sufficiency of the description of the occurrence.

4. This answering defendant admits the allegations contained in numerical paragraph 8, 9 and in the first sentence of numerical paragraph 12 of the Amended In-

tervening Complaint to the extent that it admits that it is a manufacturer and seller of heavy equipment, that it was a manufacturer and seller of the D8K series tractor and that it manufactured and originally sold the subject tractor which was subsequently sold by Wayne Supply Company.

5. This answering defendant admits the allegations contained in numerical paragraph 15 of the Amended Intervening Complaint to the extent that it admits that it designed and manufactured the subject D8K tractor and that the tractor as designed, manufactured, assembled, marketed and expressly warranted by this answering defendant was reasonably fit for the general uses and purposes for which the tractor was intended.

6. This answering defendant, partly upon information and belief, admits the allegations contained in numerical paragraphs 20 and 22 of the Amended Intervening Complaint, except it believes the sale by Wayne Supply Company was on or about August 31, 1981, and that Wayne Supply's last service work on the subject tractor prior to the occurrence and injury was on July 5, 1988.

7. This answering defendant denies the remaining allegations contained in the Amended Intervening Complaint which pertain to it and which are not expressly admitted herein and, by way of general response to the allegations contained in the Intervening Complaint, affirmatively states that the D8K track-type tractor, when manufactured and sold, was merchantable and fit for the use for which it was manufactured, intended and supplied, and the defendant specifically denies any and all allegations contained in the Amended Intervening Complaint which state or infer that the subject machine, at the time of original manufacture and delivery was defective, unfit or unsafe for the purposes for which the product was intended to be used, and it specifically denies any breach of warranties, negligence or other liability on its part.

SECOND DEFENSE

The plaintiff, James David Lewis, was guilty of negligence and carelessness which was a substantial cause of the occurrence and alleged damages alleged in the Complaint and Amended Intervening Complaint herein, and the negligence, fault and failure on his part to exercise ordinary care in the circumstances constitutes a complete bar to the plaintiff's claims for damages herein pursuant to KRS 411.320(3), and reference is made to the Eighth Defense herein.

THIRD DEFENSE

For further defense herein, this answering defendant states and alleges that the design, methods of manufacture and testing of the subject tractor conformed to the generally recognized and prevailing standards or state-of-the-art in existence at the time of design and manufacture, and this answering defendant pleads and relies upon the presumption that the product was not defective, as provided in KRS 411.310(2), and upon other applicable provisions of the Product Liability Act of Kentucky, and reference is made to the Eighth Defense herein.

FOURTH DEFENSE

For further defense herein, this answering defendant states and alleges that the injuries and damages alleged in the Complaint and Amended Intervening Complaint would not have occurred if the subject tractor had been used in its original, unaltered and unmodified condition, and this answering defendant pleads and relies upon the provisions of the Product Liability Act of Kentucky, including KRS 411.320, and reference is made to the Eighth Defense herein.

FIFTH DEFENSE

For further defense herein, this answering defendant states and alleges that the injuries and damages alleged in the Complaint and Amended Intervening Complaint occurred more than five (5) years after the date of the sale of the subject tractor to the first consumer and, ac-

cordingly, this answering defendant pleads and relies upon the presumption that the product was not defective, as provided in KRS 411.310(1), and reference is made to the Eighth Defense herein.

SIXTH DEFENSE

For further defense herein, this answering defendant states and alleges that in the event it is determined that the plaintiff was not at fault herein and that this answering defendant was to some extent at fault herein, which fault on its part is specifically denied, its liability herein is limited in accordance with the percentage of fault allocated to it.

SEVENTH DEFENSE

For further defense herein, this answering defendant states and alleges that the claims predicated upon this answering defendant's alleged breach of warranties are barred by the limitations provisions of KRS 355.2-725 and by the provisions of KRS 355.2-316(2), KRS 355.2-318, KRS 355.2-607(3) and other applicable provisions of the Uniform Commercial Code and by other applicable law, and reference is made to the Eighth Defense herein.

EIGHTH DEFENSE

For further defense herein, this answering defendant states and alleges that for the reasons asserted in its Answer to the plaintiff's Complaint herein, all of which are hereby adopted and reaffirmed, and for the reasons asserted in this Answer to the Amended Intervening Complaint, this answering defendant has incurred no legal liability to pay damages to the plaintiff and, therefore, this answering defendant has no legal liability to the intervening plaintiff pursuant to KRS 342.700 or otherwise.

WHEREFORE, the defendant, Caterpillar Inc., prays that the Amended Intervening Complaint be dismissed as

against it; prays for its costs herein expended and for all further and proper relief to which it may appear entitled.

LESLIE W. MORRIS II
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507
Telephone: 606-231-3000

By /s/ Leslie W. Morris II
Attorneys for Defendant,
Caterpillar Inc.

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

**ANSWER OF PLAINTIFF, JAMES DAVID LEWIS,
TO CROSS CLAIM**

Comes the Plaintiff, James David Lewis, and for his answer to the cross claim as filed by the Intervening Plaintiff, Liberty Mutual, would state as follows:

1. The Plaintiff, James David Lewis, would affirm the allegations contained in numbers 1, 2, 3, and 4.

2. The Plaintiff would state that he did enter into an agreement with Wayne Supply Company whereby a settlement was reached. However, this settlement did not settle all claims against Wayne Supply Company as the terms of the settlement reserved the subrogation claim which Liberty Mutual would have against Wayne Supply Company and provided that Wayne Supply Company would be responsible for said subrogation rights.

3. The Plaintiff would deny the allegations contained in numbers 6 and 7 of the cross claim and would state that the intervening plaintiff's remedy would lie against Wayne Supply Company pursuant to the applicable law and pursuant to the settlement agreement reached between the Plaintiff and Wayne Supply Company.

WHEREFORE, the Plaintiff, James David Lewis, would respectfully request that the cross claim which has been filed herein be dismissed and held for naught and that the Plaintiff recover all of his costs incurred herein including, but not limited to, a reasonable attorney's fee.

Respectfully submitted,

/s/ Leonard Stayton
LEONARD STAYTON
Attorney at Law
P.O. Box 1386
Inez, Kentucky 41224

[Certificate of Service Omitted]

[Filed Jun 8, 1993]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

[Caption Omitted]

**AGREED ORDER DISMISSING CLAIMS
AGAINST WHAYNE SUPPLY COMPANY**

The court being sufficiently advised that the intervening plaintiff, Liberty Mutual Insurance Group, has compromised and settled a disputed claim against defendant Wayne Supply Company only,

IT IS HEREBY ORDERED that plaintiffs' intervening complaint against Wayne Supply Company shall be and hereby is **DISMISSED**, with prejudice, with each party to pay its own costs.

There being no just cause for delay, this is a final and appealable order.

/s/ Henry R. Wilhoit, Jr.
Judge
United States District Court
Eastern District of Kentucky
Ashland Division

Date: June 8, 1993

HAVE SEEN AND AGREED:

/s/ John L. Tate
JOHN L. TATE
CATHARINE CRAWFORD YOUNG
STITES & HARBISON
600 West Main Street
Louisville, Kentucky 40202
(502) 587-3400
Counsel for Defendant,
Whayne Supply Company

/s/ Phillip M. Moloney
PHILLIP M. MOLONEY
STURGILL, TURNER & TRUITT
155 East Main Street
Lexington, Kentucky 40507
(606) 255-8581
Counsel for Liberty Mutual Insurance Group

United States District Court
EASTERN DISTRICT OF KENTUCKY

ASHLAND

CIVIL MINUTES — TRIAL

Case No. 90-84 At Ashland, KentuckyDate November 22, 1993Style JAMES DAVID LEWIS, ET AL. VS. CATERPILLAR, INC., ET AL.

DOCKET ENTRY The motion of the parties to withdraw all chart exhibits is GRANTED and all chart exhibits shall be returned to the submitting party.

Eastern District of Kentucky
FILED

NOV 22 1993

At Ashland
LESLIE G. WHITMER
Clerk, U.S. District Court

PRESENT:

HON. HENRY R. WILHOIT, JR., JUDGE
Christina M. Venoy
Deputy Clerk

Peggy W. Weber
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

LEONARD STAYTON
PHILLIP MOLONEY FOR INT. PLTF.

ATTORNEYS PRESENT FOR DEFENDANTS:

WILLIAM MAREADY
LESLIE MORRIS
PHILLIP MOLONEY FOR 3rd PTY DEPT.

Case called and continued to _____ for trial.

COURT TRIAL

X JURY TRIAL The Jury impaneled and sworn is as follows:

(1) 376 Vanessa L. Lowe (3) 429 Joseph Southers (5) 361 Mary A. Springer

(2) 437 Beverly J. Litteral (4) 324 Larry E. Wright (6) 306 Pamela J. Reynolds

(1) ~~376 Vanessa L. Lowe~~ (7) 357 David J. Gollihue (2nd Alternate)

Introduction of evidence for _____ plaintiff _____ defendant _____ begun, _____ resumed, and concluded; ^{not}

Rebuttal evidence; _____ Surrebuttal evidence _____ Continued to _____ further trial.

X Jury retires to deliberate at 11:35 a.m.; Jury returns at 3:55p.m.

JUDGMENT BY COURT X JURY VERDICT. SEE VERDICTOR ANSWERS TO INTERROGATORIES

X Jury polled.

Proposed Findings of Fact, Conclusions of Law & Judgment to be prepared by _____ plaintiff; _____ defendant.

Submitted. _____ BRIEFS to be filed _____ Plaintiff _____ Defendant _____ Reply

within _____ days following the filing of transcript by Official Court Reporter.

Copies:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

[Caption Omitted]

JUDGMENT IN A CIVIL CASE

- ☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict by answers to Special Interrogatories,

IT IS ORDERED AND ADJUDGED

That the plaintiff and intervening plaintiff take nothing, that the action be dismissed on the merits, and that the defendant, Caterpillar, Inc., recover of the plaintiffs, its costs of this action.

Date November 23, 1993

Leslie G. Whitmer
Clerk

/s/ Christina M. Venoy
(By) Deputy Clerk

[Filed Oct. 11, 1995]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 94-5253

JAMES DAVID LEWIS, PLAINTIFF-APPELLANT,
LIBERTY MUTUAL INSURANCE GROUP,
INTERVENING PLAINTIFF,

v.

CATERPILLAR, INC.,
DEFENDANT and THIRD-PARTY PLAINTIFF-APPELLEE,

GENE A. WILSON ENTERPRISES, INC.,
THIRD-PARTY DEFENDANT,

WHAYNE SUPPLY COMPANY, DEFENDANT.

On Appeal from the United States District Court
for the Eastern District of Kentucky

BEFORE: WELLFORD, MILBURN, and SUHRHEIN-
RICH, Circuit Judges.

PER CURIAM. Plaintiff James David Lewis appeals the jury verdict for defendant Caterpillar, Inc. in this diversity action for personal injury. On appeal, the issues are (1) whether the district court erred in denying plaintiff's motion to remand the case to state court, (2) whether the district court erred in limiting the scope of discovery of prior similar accidents, (3) whether this

court should enter sanctions against defendant for defendant's alleged improper response to discovery requests, (4) whether the district court erred in excluding certain exhibits, (5) whether the district court erred in excluding certain witnesses from testifying at trial, and (6) whether the district court erred by failing to instruct the jury on defendant's alleged failure to warn. For the reasons that follow, we vacate and remand.

I.

A.

On July 9, 1988, plaintiff James David Lewis, a resident of Louisa, Kentucky, was injured while he was operating a Caterpillar D8K bulldozer, which was manufactured by defendant Caterpillar, Inc., a Delaware corporation with its principal place of business in Illinois. While plaintiff was operating the bulldozer near Louisa, Kentucky, a hydraulic hose connected to the cylinder that raises and lowers the bulldozer blade ruptured causing hydraulic fluid to spray over the engine of the bulldozer and also on plaintiff. The fluid ignited, and plaintiff received burns over approximately 48% of his body.

The evidence at trial showed that the steel hydraulic hose ruptured because it was positioned against the hood of the bulldozer causing the two steel surfaces to grind against each other. Caterpillar presented evidence that its XT3 hydraulic hoses are made with four layers of steel wrappings that give them a hardness greater than that of ball-bearing steel. Caterpillar argued at trial that several conditions existing in the D8K at the time of the accident, but not existing at the time of the D8K's manufacture, caused the hydraulic hose to fail. Caterpillar presented evidence that at same point prior to the accident the D8K had been hit with a force of 15,000 to 30,000 pounds. This force sheared off a bolt that stabilized the tube assembly to which the hydraulic hoses were connected and bent the tube assembly about 20 degrees.

In addition, Caterpillar presented evidence that the hoses in the D8K at the time of the accident were manufactured by someone other than Caterpillar and were an inch to an inch and a half too long. Because the hoses were too long, they made a larger loop thereby coming closer to the hood of the D8K. Further, evidence showed that the hoses, which had different types of connections on each end, had been installed backwards also causing the hoses to be positioned closer to the hood. Although Caterpillar's maintenance manual includes a visual depiction of how the hose is to be installed, the parties disputed whether this adequately explained the proper installation of the hoses.

On the other hand, plaintiff argued at trial that, notwithstanding these conditions, the D8K had a design defect that caused the accident in this case. Plaintiff's expert, Wayne Coloney, testified that the accident could have been avoided if Caterpillar had used a deflecting shield that would have prevented hydraulic fluid from spraying on the operator of a D8K should a hydraulic hose rupture. Plaintiff also argued that Caterpillar was aware of the propensity for and the danger of hydraulic hoses rupturing and causing fires on the D8K.

B.

Plaintiff initiated this action on June 22, 1989 in the Lawrence [Kentucky] Circuit Court. In his complaint, plaintiff alleged strict liability in tort, negligence, and breach of warranty and named as defendants Caterpillar, Inc., the manufacturer of the bulldozer, and Wayne Supply Co., a Kentucky corporation with its principal place of business in Kentucky, which serviced the bulldozer prior to the incident at issue in this case. After plaintiff filed his complaint, Liberty Mutual Insurance Company ("Liberty Mutual"), a Massachusetts corporation with its principal place of business in Massachusetts, intervened as a plaintiff in this case. Liberty Mutual brought claims against both Caterpillar and Wayne Supply Co.

for subrogation of worker's compensation benefits paid to Lewis on behalf of his employer and third-party defendant, Gene A. Wilson. While the case was pending in the state court, plaintiff entered into a settlement agreement with Wayne Supply Co. However, because Liberty Mutual was not included in the settlement agreement, it continued to assert its claims against Wayne Supply Co. Liberty Mutual also filed a cross-claim against Lewis for reimbursement for any worker's compensation paid him by Wayne Supply Co. with regard to Liberty Mutual's subrogation interest.

After learning of the settlement between plaintiff and Wayne Supply Co., Caterpillar removed the case to federal court, over Lewis' objection, on June 21, 1990. Plaintiff and Wayne Supply Co., however, did not file anything notifying the Lawrence Circuit Court of the settlement until August 2, 1990. Lewis subsequently filed a motion to remand the case to state court on the ground that because defendant Wayne Supply Co., a Kentucky corporation, remained a defendant in the case by virtue of Liberty Mutual's subrogation claim, there was not complete diversity at the time of the removal from the state court. This district court denied this motion on September 24, 1990.

Wayne Supply Co. and Liberty Mutual subsequently settled their claims on June 8, 1993. A jury trial commenced on November 15, 1993. The jury returned a verdict in favor of defendant Caterpillar, Inc. on November 22, 1993. Plaintiff then filed a motion for a new trial, but the district court denied this motion on February 1, 1994. This timely appeal followed.

II.

A.

Plaintiff argues that the district court erred in denying his motion to remand the case to state court. Specifically, plaintiff asserts that the district court lacked subject mat-

ter jurisdiction because complete diversity between the parties did not exist at the time of removal. Plaintiff bases this assertion on the fact that, at the time of removal, plaintiff, a Kentucky resident, continued to be a party to the case, and defendant Whayne Supply Co., a Kentucky corporation, remained a defendant in the case by virtue of intervening plaintiff Liberty Mutual's subrogation claim against it. Removal is a question of federal subject matter jurisdiction that we review de novo. *Certain Interested Underwriters at Lloyd's London, England v. Layne*, 26 F.3d 39, 41 (6th Cir. 1994); *Van Camp v. AT & T Information Sys.*, 963 F.2d 119, 121 (6th Cir.), cert. denied, 113 S. Ct. 365 (1992). When reviewing the denial of a motion to remand a case to state court, "we look to determine 'whether the case was properly removed to federal court in the first place.'" *Van Camp*, 963 F.2d at 121 (quoting *Fakouri v. Pizza Hut of America, Inc.*, 824 F.2d 470, 472 (6th Cir. 1987) (quoting *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 818 (9th Cir. 1985))). *When an action is removed based on diversity, we must determine whether complete diversity exists at the time of removal.* *Higgins v. E.I. Dupont de Nemours & Co.*, 863 F.2d 1162, 1166 (4th Cir. 1988). Under 28 U.S.C. § 1332(a)(2), subject matter jurisdiction based on diversity of citizenship vests federal district courts with jurisdiction in cases of sufficient value between "citizens of a State and citizens or subjects of a foreign state." *Id.* A natural person's citizenship is determined by his domicile, while a corporation has the citizenship of the state of its incorporation and its principal place of business. *Safeco Ins. Co. v. City of White House*, 36 F.3d 540, 544 (6th Cir. 1994). "Diversity jurisdiction attaches only when all parties on one side of the litigation are of a different citizenship from all parties on the other side of the litigation." *SHR Limited Partnership v. Braun*, 888 F.2d 455, 456 (6th Cir. 1989). *Accord Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, (1806); *Safeco Ins. Co.*, 36 F.3d at 545;

and *Certain Interested Underwriters*, 26 F.3d at 42. In this regard, "[a] plaintiff seeking to bring a case into federal court carries the burden of establishing diversity jurisdiction." *Certain Interested Underwriters*, 26 F.3d at 41.

Caterpillar asserts that diversity jurisdiction was created when plaintiff settled with Whayne Supply Co. Thus, "[t]he question is simply whether, at the time of removal, the plaintiffs effectively 'ha[d] taken the resident defendant out of the case, so as to leave a controversy wholly between the plaintiff[s] and the nonresident defendant.'" *Vasquez v. Alto Bonito Gravel Plant Corp.*, 56 F.3d 689, 692 (5th Cir. 1995) (quoting *American Car & Foundry Co. v. Kettelhake*, 236 U.S. 311, 316 (1915)). *See Mancari v. AC & S Co.*, 683 F. Supp. 91, 93 (D. Del. 1988) (applying the voluntary act of the plaintiff doctrine and holding that a case may become removable after being initiated in state court where non-diverse defendant was dismissed from case leaving a new state of complete diversity between the parties). In this case, as plaintiff notes, Liberty Mutual continued to assert its claim against defendant Whayne Supply Co. after plaintiff settled with Whayne Supply Co.¹ Thus, at the time Caterpillar removed the case to federal court, plaintiff, a resident of Kentucky, remained a party to the case by virtue of his claim against defendant Caterpillar. Defendant Whayne Supply Co., a Kentucky corporation, was also a party to the case in light of intervening plaintiff Liberty Mutual's

¹ Plaintiff claims that his settlement with Whayne Supply Co. was only partial and that he reserved a claim against Whayne Supply Co. for reimbursement for worker's compensation paid to him by Liberty Mutual. Lewis asserts that Liberty Mutual's subrogation claim against defendant Whayne Supply Co. was filed on behalf of Liberty Mutual and himself. We need not resolve this issue in light of our conclusion that because plaintiff and defendant Whayne Supply Co. remained parties to the case at the time of removal, diversity was not complete.

subrogation claim against it.² Thus, complete diversity did not exist at the time that the case was removed to federal court. Unfortunately, we must remand a case that has proceeded through judgment in the district court. We hold that the district court erred in denying plaintiff's motion to remand this case to the state court for lack of subject matter jurisdiction because complete diversity did not exist at the time this case was removed from the state court.³

III.

For the reasons stated, the judgment of the district court is VACATED and this case is REMANDED to the district court.

² Although Caterpillar argues on appeal that parties named in an intervening complaint are not included in diversity determinations, Caterpillar cites no authority for this proposition. This argument is not persuasive. This court has held under other circumstances that an intervening party may destroy diversity jurisdiction. *Cf. Jenkins v. Reneau*, 697 F.2d 160, 162 (6th Cir. 1983) (holding that an intervening petition by a non-diverse indispensable party destroys diversity jurisdiction).

³ Because we hold that the district court lacked jurisdiction over this case, we do not reach plaintiff's other arguments on appeal.

SUPREME COURT OF THE UNITED STATES

No. 95-1263

CATERPILLAR INC.,
Petitioner,

v.

JAMES DAVID LEWIS

April 15, 1996

Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted limited to Questions 1 and 2 presented by the petition.